Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KIMBERLY BRANDT,
Petitioner,

vs.

SHOP 'N SAVE WAREHOUSE FOODS, INC.,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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WILLIAM E. MOENCH
(Counsel of Record)
MARY ANNE SEDEY
SEDEY, MOENCH & ASSOCIATES
3030 South Grand Avenue
Suite 200
St. Louis, Missouri 63118
(314) 773-3566

Attorneys for Petitioner Brandt

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err by reversing the findings of the judge and jury for the plaintiff, where the following occurred at trial: (1) plaintiff proved a prima facie case of sex discrimination, (2) plaintiff proved the defendant's articulated reason for its decision was a pretext, and (3) no evidence contrary to a finding of sex discrimination was adduced?

Did the Court of Appeals err by reversing the findings of the judge and jury for the plaintiff, where the Court of Appeals created its own non-discriminatory reason for the employment action, which was expressly denied by the employer?

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, rendered on March 17, 1997, is officially reported at 108 F.3d 935, 73 FEP Cases 652 (8th Cir. Mar. 17, 1997), reh'g denied May 6, 1997. A copy of the Opinion is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit Court of Appeals was entered on March 17, 1997. Plaintiff Brandt filed a Petition for Rehearing with Suggestion for Rehearing En Banc. The Court of Appeals denied the petition for rehearing by the panel on May 6, 1997. The suggestion for rehearing en banc was also denied on that date, with the notation that Chief Judge Richard S. Arnold, Judge McMillian and Judge Hansen would grant the suggestion. A copy of the Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced in the Appendix to this Petition. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

Section 2000e-2 (a) of the Civil Rights Act of 1964 provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

Petitioner Kim Brandt, a member of the United Food and Commercial Workers (UFCW) Local 88 labor union, worked as a meat wrapper out of the union hall for Shop 'N Save and other grocery stores on an "as needed," temporary basis from 1987 to July 1991. The Shop 'N Save employees who knew Brandt and worked with her, without exception, praised her work.

The UFCW Local 88 collective bargaining agreement with Shop 'N Save now calls the meat wrapper position "meat clerk," and has broadened the job description to include all duties previously assigned the "meat cutter" position, except operating a band saw. The job of "meat cutter" had traditionally been a job held by men. Evidence presented at trial showed that of the 600-650 meat cutters on Local 88's membership roster at that time, only three or four were female. Evidence was also presented that the position of meat cutter paid better than that of meat clerk. Shop 'N Save's meat department work force was segregated by gender in that most of the meat clerks (the lower paying job) were women, and all but one of the meat cutters were men, even though the duties of the positions were nearly identical. As of the time of trial, Shop 'N Save had only one female meat cutter in its history, and she was brought in when Shop 'N Save acquired the Kroger grocery chain.

Brandt filled out an application for permanent employment with Shop 'N Save in May, 1990. Brandt talked with Harold "Butch" Covili, Shop N' Save's senior vice president of operations, about her interest in becoming a meat cutter. In the same time frame, she told Danny Howard, who was one of three "meat specialists" assigned to supervise meat operations at Shop 'N Save's twenty-eight stores, of her interest in an apprentice meat cutter position with Shop 'N Save. She also told Howard she knew that Shop 'N Save had hired no woman meat cutters. Brandt felt that she could handle the job of meat cutter, and in

fact, had performed all of the duties of an apprentice meat cutter, except cutting bone-in pork loins.

On August 17, 1990, Brandt sent a letter and resume to Richard Marty, then acting senior vice president of human resources for Shop 'N Save, and a similar letter to Covili, expressing interest in joining Shop 'N Save as a permanent employee in a position as a "female apprentice meat cutter." Brandt specified in the letters that she was a female, because she did not know Marty personally, and because the name Kim can be both a man's and woman's name. Brandt also knew she was applying for a job traditionally held by men, and wanted Marty to know she was a woman.

As a courtesy, Marty interviewed Brandt on September 7, 1990, and told her then and in a follow-up letter that Shop 'N Save did not have a position to offer her. However, his letter said Brandt's resume would be retained in Shop 'N Save's active files for one year. Marty testified that active files kept by the company contained resumes that might help them find someone to fill an employment need.

In May, 1991, Marty hired John Dougherty to fill the position of senior vice president of human resources, the position Marty himself had been holding temporarily, and Marty returned to his position with Shop 'N Save's parent corporation. Covili remembered Dougherty asking him about Brandt's abilities. Danny Howard, who supervised meat operations at the store where Brandt worked, also knew of Brandt's ambitions, and was still working for the company.

Also in May, 1991, Dougherty and area-wide meat manager Bill Fant decided to hire an apprentice meat cutter. The apprentice meat cutter job description in effect at that time provided, "An apprentice is a person learning all the details and developing manual skill for performing, after a stated number of years training, the duties of a journeyman meat cutter." Dougherty testified that he normally looked to internal candidates first when filling an opening.

Shortly after deciding to create this position, Dougherty received a call from Bob Frentzel, an old friend he had known since 1966. At trial, Dougherty testified as follows:

> Q: And you knew Frentzel was looking for a job when management determined that an apprentice meat cutter should be hired, didn't you?
>
> A: No.

Shop 'N Save, in its appellant's brief and its reply brief, again vehemently denied that Dougherty knew Frentzel was looking for a job when he set the qualifications for this "special" apprentice position.

When Frentzel first called Dougherty, Frentzel was unemployed, and sought whatever employment assistance Dougherty could offer. Dougherty had Frentzel send him a resume, gave it to Fant, and suggested to Fant that he interview Frentzel. Frentzel interviewed with Fant and Danny Howard. Frentzel was the only person interviewed, or even considered, for the job. The job was never posted or otherwise advertised.

In his interview, Frentzel was not told that Shop 'N Save was looking only for someone who had a background in management and some college. Frentzel had management experience, although not for several years; he had "some college," although serious doubt was cast upon both just how much "some" is, and the extent to which the decision-makers were genuinely interested in that aspect of Frentzel's background. Frentzel had virtually no meat experience.

On June 3, 1991, Bob Frentzel was on the job in the apprentice meat cutter position, at the same store where Brandt happened to be working as a part time meat wrapper. That same day, Brandt confronted Dougherty and told him she believed his failure to consider her for the apprentice job was sex discrimination. Dougherty told her that she wasn't considered because they were

looking for someone with a management and college background.

Two weeks later, Brandt filed a charge of employment discrimination against Shop 'N Save with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights. Brandt filed suit against Shop 'N Save in May 1992, alleging sex discrimination and retaliation in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17, and the comparable Missouri Human Rights Act, Mo. Rev. Stat. §§ 213.010-.126.

At trial, Shop 'N Save claimed that this particular opening for an apprentice meat cutter was really a management track position which required managerial experience and some college. However, it produced no documentary evidence of these requirements. The only job descriptions that existed for these jobs did not include them. At Dougherty's direction, Shop 'N Save stated in its position statement to the EEOC that it would be promoting Frentzel to Meat Manager upon completion of his two-year apprenticeship training program. However, as of the date of trial, three and one-half years after he was hired, Frentzel had still not been promoted to management, despite the fact that Shop 'N Save had opened new stores and had promoted several other meat cutters into management. Between the time of his employment at Shop 'N Save and the time of trial, Frentzel had not completed any more college credits.

Frentzel was the only individual to have ever been hired by Shop 'N Save as a "special" apprentice meat cutter (no meat background, management experience, higher education, promotion to follow two-year apprenticeship program). Brandt, on the other hand, was the only one ever to be rejected for this "special" position.

At trial, Shop 'N Save also claimed that none of the decision-makers were aware that Brandt was interested in the apprentice meat cutter's position. However, Brandt had told both Covili

and Howard about her ambition, and Howard was one of the decision-makers. She had written a letter to Covili and Marty stating this ambition, and that letter remained in Shop 'N Save's active files at the time Frentzel was hired.

Trial was held before a jury on Plaintiff's Missouri Human Rights Act claim, and the Title VII claim was tried to a magistrate judge by consent of the parties and pursuant to 28 U.S.C. ¶ 636(c). The jury found for Shop 'N Save on Brandt's claim of retaliation, but for Brandt on her claim of sex discrimination. The jury further determined that damages were warranted, including punitive damages. After disposing of post-trial motions, Judge Adelman entered judgment on the jury's verdict, and wrote the Title VII opinion himself, awarding Brandt equitable relief and $22,500 in compensatory damages. The court also awarded Brandt $35,000 in punitive damages and $39,852.25 in attorney fees and costs. In his Memorandum and Order, Judge Adelman wrote,

> Defendant's articulated justification for not hiring plaintiff to the position of Apprentice Meat Cutter was a pretext for the true reason(s) for this employment action. The jury found, and this Court finds, that a motivating factor in defendant's decision not to award plaintiff the position of Apprentice Meat Cutter was her sex. The jury found, and this Court finds, that defendant's conduct was intentional, and was outrageous because of evil motive or reckless indifference to plaintiff's right not to be discriminated against on the basis of her sex.

Appendix at A-22.

A divided panel of the Eighth Circuit Court of Appeals reversed the judgment of the District Court in favor of Kimberly Brandt on her claims of sex discrimination, with Judge Heaney strongly dissenting. The majority conceded that Brandt established a prima facie case of sex discrimination. Shop 'N Save

proffered as its "legitimate reasons" that Brandt was not qualified to fill the apprentice position because she had no management experience or college, and because the decision-makers did not know she was interested in the position. Even the majority was confident that the jury easily might have found that Shop 'N Save's proffered reasons were a fabrication, a pretext for its true reasons. Judge Bowman, writing for the majority, added, "We are so persuaded ourselves." Appendix at A-7.

Nevertheless, the majority held that Brandt did not meet her burden of proving that the pretext was intended to conceal unlawful discrimination, or that her gender in any way motivated Shop 'N Save's action. The Court concluded that the jury's finding of unlawful discrimination could not be sustained as there was insufficient evidence to support it, and that Shop 'N Save was entitled to judgment as a matter of law on Brandt's claims of sex discrimination.

The majority went on to surmise that it believed the real reason Frentzel had gotten the job was because of his friendship with Dougherty. The Court believed that Frentzel used his "network," and Dougherty obliged his friend by supporting his application, if not creating a tailor-made position for Frentzel. This was despite the fact that Dougherty testified at trial that at the time the job qualifications were set, he had no idea Frentzel was looking for a job.

Judge Heaney pointed out in his dissent that, as the majority conceded, Brandt established a prima facie case. He also acknowledged that because Shop 'N Save proffered reasons for its decision, the legal presumption of discrimination disappeared; however, the elements of the prima facie case remained as evidence from which the fact finder may infer discrimination. Judge Heaney believed that Brandt presented an "arsenal of evidence" to discredit Shop 'N Save's articulated reasons for hiring Frentzel, and pointed out that even the majority did not believe the fabricated reasons. Yet after discrediting Shop 'N

Save's given reasons, the majority created its own nondiscriminatory explanation for the employment decision. Judge Heaney wrote that Shop 'N Save should not benefit from failing to assert the "true" reason for its decision. He found no basis in the record for the majority's speculation, and found that even if there were, it would be for the fact finder, not the appellate court, to consider in determining the employer's motive.

Brandt filed a Petition for Rehearing with Suggestions for Rehearing En Banc. The suggestion for rehearing en banc was denied. The order noted that Chief Judge Richard S. Arnold, Judge McMillian, and Judge Hansen would have granted the suggestion. The petition for rehearing by the panel was also denied.

The basis for federal jurisdiction in the trial court was 28 U.S.C. §1343 (a)(4) (federal question), 42 U.S.C. §2000e-5 (f)(3) (Title VII), and 28 U.S.C. §1367 (a) (supplemental jurisdiction over state claim under the Missouri Human Rights Act, Mo. Rev. Stat.§§ 213.010-.126), and 28 U.S.C. § 636(c) (magistrate jurisdiction).

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

This is yet another in the long line of cases presented to this Court which grapple with the true meaning of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407, [62 FEP Cases 96] (1993). This Court should grant this Petition for Writ of Certiorari because the confusion that has happened in the Eighth Circuit post-*Hicks* is representative of what is happening in many of the other Circuits. This case is also an example of the extremes to which the appellate courts will go if the confusion post-*Hicks* is left unchecked. Finally, the Eighth Circuit Court of Appeal's opinion in this case is uncomplicated and presents the problem issues in a clear, straightforward manner. It is the perfect springboard to launch the re-analysis of the issues plaguing the various Courts of Appeals over the four years since *Hicks* was decided. *(Cf. Fisher v. Vassar College*, 114 F.3d 1332, 74 FEP Cases 109 (2nd Cir. *en banc* June 5, 1997).

Before *Hicks*, "the circuits had split over the effect of a decision by the factfinder that the proffered nondiscriminatory reasons given by the employer were not the real reasons for its employment decisions. Some of the circuits had held that a finding of pretext mandated a finding of illegal discrimination while others had held that a finding of pretext did not." *Combs v. Meadowcraft, Inc.*, 106 F.3d 1519, 1529, 73 FEP Cases 232, 237 (11th Cir. 1997), *citing Hicks*, 509 U.S. at 511-513 (listing cases).

This Court granted certiorari in *Hicks* to decide just that question: whether, ". . . in a suit against an employer alleging intentional racial discrimination in violation of §703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. §20003-2(a)(1), the trier of fact's rejection of the employer's asserted reasons for its actions *mandates* a finding for the plaintiff. *Hicks*, 509 U.S. at 504 (emphasis added).

Judge Bowman, who wrote the opinion for the panel in *Rothmeier v. Investment Advisers,* 85 F.3d 1328. 71 FEP Cases 1458 (8th Cir. 1996), felt that with *Hicks* this Court had resolved the circuit split regarding the proof an employee must have to prevail in a Title VII case. His opinion was that pre-*Hicks*, some circuits, including the Eighth, embraced the what he called the "pretext only" rule. Under this rule, a prima facie case plus a showing that the employer's proffered legitimate reason was pretext meant that the *employee* was automatically entitled to judgment. Other circuits, however, espoused a "pretext plus" rule. These courts required more than a showing that the employer's legitimate reasons were pretext. If that was all the employee could show, without more, judgment was automatically entered for the *employer.*

All of the Courts of Appeals opinion writers seem to agree with Judge Bowman that the Supreme Court solved this split with its decision in *Hicks*. But that is where the agreement ends. From circuit to circuit, from panel to panel within the circuits, and even individually within *en banc* decisions, the judges of the Circuit Court of Appeals differ in their opinions as to what the Court's "solution" in *Hicks* is.

The split post-*Hicks* is the same split that was occurring pre-*Hicks*, only some of the Courts of Appeals have switched sides. The split is still one of "pretext only" v. "pretext plus." Some of the "pretext plus" Courts have gone even further, pushing the envelope with what this Petitioner would dub the "pretext plus the impossible" view. Petitioner's case fits under this latter category, with a twist of its own.

The disagreements stem from this Court's language in *Hicks*, and two key sections from that opinion are cited most often by the Courts of Appeals. First is the section which seems to be cited by all of the appellate courts considering this issue:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, 'no additional proof of discrimination is *required*.

509 U.S. at 511 (quoting *Hicks v. St. Mary's Honor Center*, 970 F.2d 487, 493 (8th Cir. 1992)). This passage is the one that the "pretext only" Courts hang their hats on.

The second passage of *Hicks* that is cited along with the first section, and cited mainly by the "pretext plus" Courts is this:

> Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination.

Id. n.4.

The first passage is cited by what appears to be (at this moment) a majority of the circuits to support their "pretext only" view. These Courts concede that post-*Hicks*, a finding of pretext does not mandate a finding for the plaintiff; however, such a finding does permit the factfinder to make a finding for the plaintiff. The view of these circuits is explained rather succinctly by the Eleventh Circuit panel which decided *Combs*: ". . . it follows from *Hicks* that a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action." *Combs*, 106 F.3d at 1532.

However, the panel in *Combs* acknowledged that a conflict existed within the Eleventh Circuit on this issue, and that it was

disagreeing with its earlier panels in *Walker v. NationsBank of Florida*, 53 F.3d 1548, 68 FEP Cases 314 (11th Cir. 1995) and *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 72 FEP Cases 735 (11th Cir. 1996). It found that the panels' decisions in *Walker* and *Isenbergh* were inconsistent with earlier panel holdings in *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 63 FEP Cases 838 (11th Cir. 1993) and *Batey v. Stone*, 24 F.3d 1330, 65 FEP Cases 1161 (11th Cir. 1994), and decided when there are inconsistent panel decisions "the earliest panel opinion resolving the issue in question binds this circuit until the court resolves the issue en banc." *Combs*, 106 F. 3d at 1532.

The panel in *Combs* goes on to say that this "pretext only" view of *Hicks* is supported by the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits and cites as references these cases:

> *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120, 66 FEP Cases 1102 (2nd Cir. 1994) ("A finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and thus permits the ultimate inference of discrimination.");
>
> *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1066-1067, 72 FEP Cases 518 (3d Cir. *en banc* 1996), cert. denied ___ S.Ct. ___, 1997 WL 49784, 65 USLW at 3571 (June 27, 1997) ("[T]he elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.");
>
> *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316, 63 FEP Cases 816 (4th Cir. 1993) (considering two questions at summary judgment: (1) the prima facie case and (2) "whether [the plaintiff] has shown that there is a genuine dispute of

material fact about [the defendant's] proffered explanation for the discharge");

Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083, 65 FEP Cases 585 (6th Cir. 1994) ([T]he only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury must draw, to a permissive one the jury may draw, provided that the jury finds the employer's explanation 'unworthy' of belief.") (emphasis in original)

Perdomo v. Browner, 67 F.3d 140, 146, 68 FEP Cases 1751 (7th Cir. 1995) (The district court found Perdomo's [direct] evidence of racial discrimination unpersuasive, but . . . such evidence is not required: the trier of fact is permitted to infer discrimination from a finding that the employer's proffered reason was spurious.");

Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1110, 64 FEP Cases 382 (8th Cir. 1994) ("The elements of the plaintiff's prima facie case are thus present and the evidence is sufficient to allow a reasonable jury to reject the defendant's non-discriminatory explanations. The 'ultimate question' of discrimination must therefore be left to the trier of fact to decide."), cert. denied, 115 S.Ct. 355, 65 FEP Cases 1792 (1994);

Washington v. Garrett, 10 F.3d 1421, 1433, 63 FEP Cases 540 (9th Cir. 1993) ("If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed."); and

Barbour v. Merrill, 48 F.3d 1270, 1277, 67 FEP Cases 369 (D.C. Cir. 1995) ("According to Hicks, a plaintiff need only

> establish a prima facie case and introduce evidence sufficient to discredit the defendant's proffered nondiscriminatory reasons; at that point, the factfinder, if so persuaded, may infer discrimination.").

Combs, 106 F.3d at 1535-36.

Combs stated that only the First and Fifth Circuits had issued opinions expressing opposite views. The *Combs* court cited *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 65 FEP Cases 1109 (1st cir. 1994) and *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 69 FEP Cases 1720 (5th Cir. *en banc* 1996) as being representative of those circuits holding the "pretext plus" view. The "pretext plus" view means there must be some other evidence of discrimination above and beyond the prima facie case and proof of pretext to establish a claim of discrimination. *Combs*, 106 F. 3d at 1536.

However, the *en banc* 2nd Circuit opinion in *Fisher v. Vassar College*, 114 F.3d 1332, 74 FEP Cases 109 (2nd Cir. *en banc* June 5, 1997), demonstrates that the First and Fifth Circuits have company in the "pretext plus" view. Furthermore, the *Combs* court chose panel opinions carefully to be consistent with its "pretext only" view, but other panel opinions can be used to show the opposite view in several of the Circuits. *See, e.g., EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 72 FEP Cases 1603 (6th Cir. 1997); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 72 FEP Cases 1635 (7th Cir. 1997); *Gilligan v. Dept. Of Labor, Lynn Martin*, 81 F.3d 835, 70 FEP Cases 856 (9th Cir. 1996).

The Eighth Circuit is also a good example of this panel-to-panel split within a Circuit. The 1994 Eighth Circuit case of *Gaworski*, cited by *Combs*, does indeed espouse the "pretext only" rule. The opinion states that *Hicks* "clarifies when the question of discrimination is to be left to the finder of fact and when it may be decided as a matter of law." *Gaworski* at 1108.

The majority, led by Senior Circuit Judge Lay, cited only the first passage of *Hicks*, the one finding "no additional evidence is required." It found that if a plaintiff makes a prima facie case, and shows defendant's legitimate reason to be pretextual, "then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding." *Id.* at 1109.

However, a review of the Eighth Circuit opinions after *Gaworski* demonstrates that the panel-to-panel problems outlined in *Combs* as plaguing the Eleventh Circuit are also plaguing the Eighth Circuit. The panel in *Kobrin v. University of Minnesota*, 34 F.3d 698, 65 FEP Cases 1624 (8th Cir. 1994) cited *Gaworski* and used the "pretext only" rule. But the "pretext plus" view had been espoused by Eighth Circuit panels in *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 64 FEP Cases 1799 (8th Cir. 1994) and *Krenik v. County of Le Sueur*, 47 F.3d 953, 67 FEP Cases 312 (8th Cir. 1995) before *Combs* was decided. *Combs* chose to cite *Gaworski* as the "rule of law" in the Eighth Circuit. The Eighth Circuit reviewed its own history in *Rothmeier v. Investment Advisers, Inc.* in 1996, and conceded that since *Hicks*, "our Circuit's pronouncements on this issue have not been models of apparent consistency." *Rothmeier*, 85 F.3d 1328, 1336, 71 FEP Cases 1458 (8th Cir. 1996).

In *Rothmeier*, the plaintiff filed a discrimination claim, alleging that he had been fired at forty-six on account of his age, although the same decision-maker had hired him at forty-three. Shortly before his termination, the plaintiff had conducted an investigation of the company's securities reporting practices, and reported to the decision maker that the company had violated SEC reporting rules. The district court granted summary judgment for the employer. On appeal, summary judgment was affirmed.

The panel in *Rothmeier* concluded that *Hicks* had rejected both the "pretext only" and "pretext plus" approaches, and chose

a middle ground in their stead. This time, the court held that where a prima facie case and pretext have been proven, an inference of discrimination is not always permissible, but may or may not be, depending on the particular case.

Of note is the *Rothmeier* panel's emphasis that the plaintiff's own evidence of pretext actually *contradicted* his theory of age discrimination:

> "Rothmeier acknowledges that he 'was discharged because IAI wanted to cover up its SEC problems and keep the millions of dollars it illegally collected' in violation of SEC regulations. . . . This acknowledgment standing alone would completely refute Rothmeier's claim of age discrimination."

Id. at 1337 (citing Rothmeier's brief at 23).

Finally, the Eighth Circuit *en banc* decided to try to "unify and clarify our understanding of the Supreme Court's standards" in *Hicks* in the case of *Ryther v. KARE II*, 108 F. 3d 832, 73 FEP Cases 373 (8th Cir., *en banc*, March 6, 1997) cert. denied ___ S.Ct. ___, 1997 WL 181004, 65 USLW 3694 (U.S. June 27, 1997). There, the six-member majority held that after the defendant offers a non-discriminatory reason for its actions, "[t]he elements of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff." The Court found support from the Third Circuit's *en banc* decision in *Sheridan*, where "the Court set forth the same standards and interpretation of *Hicks* as we do now." The Court then set forth this standard:

> [W]e have understood Hicks to hold that the elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.

Id. at 837 (citing *Sheridan*, 100 F.3d at 1066-1067).

The *Rythe*r court acknowledged only one exception to this rule: when the plaintiff's evidence of pretext is, "standing alone, *inconsistent* with a reasonable inference of . . . discrimination." *Rythe*r at 837 n.4 (emphasis added)(citing *Rothmeier* at 1337). That is the only exception cited by the *Rythe*r court to its holding that if the jury finds the employer's stated reason to be untrue, it is entitled, but not required, to make a finding of illegal discrimination.

How does all of this apply to *Brandt*? The *Rythe*r Court held, *en banc*, that after a jury verdict has been rendered, judges must be guarded in ruling on motions for judgment as a matter of law. The six-member majority opined that determinations of credibility and weight of evidence are to be made by the jury. Reversible error occurs only where there is a *complete absence of probative facts* to support the jury's conclusion. "And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Rythe*r at 845 (citing *Lavender v. Kurn*, 327 U.S. 645, 653 (1946)).

The majority in this case (Judges Bowman and Wollman) disagreed with the factual findings made by the jury, replaced the jury's determination with its own non-discriminatory factual scenario, and reversed the verdict of the jury.

Petitioner, as well as the majority of the judges of the Eighth Circuit, believes that *Hicks* should be interpreted with the "pretext only" view. Once plaintiff makes a prima facie case and offers evidence demonstrating that an employer's stated reason for its decision is false, the determination of the real reason for the employer's action is for the fact finder to make, unless the plaintiff has admitted through her own evidence that illegal discrimination was *not* the reason for the employer's decision.

*Rythe*r at 837 n.4. Because Brandt offered no evidence inconsistent with a finding of sex discrimination, the issue is one for the finder of fact.

As the majority opinion recognizes, the issue here is not whether Brandt made a prima facie case, or whether she proved the employer's articulated reason was a pretext. Here, Brandt presented evidence in her prima facie case that gives rise to an inference of sex discrimination: a less qualified male was preselected and given the job, despite the fact that Brandt had applied for it, and been told that her application would remain active during the time period that the less qualified male was hired. Appendix at A-10 (J. Heaney, dissenting).

After Brandt made her prima facie case, Shop n' Save had the burden of offering evidence of a legitimate, nondiscriminatory reason for its decision. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 507. Shop 'N Save offered two: that the decision-makers were unaware of Brandt's ambition, and that the job required management experience and college that Brandt did not have. It then became Brandt's burden to persuade the trier of fact that Shop n' Save's asserted reason was not true, "thus raising the inference that sex was a motivating factor" in the decision. Appendix at A-6.

Brandt met her burden of persuading the trier of fact that Shop 'N Save's articulated reasons were phony. Shop 'N Save's first argument was that the decision-makers were unaware of Brant's desire to become an apprentice meat cutter. But Brandt offered evidence that one of the people she had talked to about her ambition, and about the fact that she would be the first woman hired as a meat cutter, was Danny Howard, one of the two men who interviewed Frentzel for the job. Shop 'N Save's first articulated reason was totally unbelievable, and neither the jury, the judge, nor the majority on appeal believed it.

Shop 'N Save proffered as its second legitimate reason, that this job was actually a management track job, and because of that, it required management experience and some college, which Brandt didn't have. However, this too proved to be a ruse, since the interviewers did not ask Frenztel about this kind of background. Both the majority and dissent were unconvinced by Shop 'N Save's "dissembling." Judge Bowman wrote, "[T]he jury easily might have found . . . that Shop n' Save's proffered 'legitimate reason' was a fabrication, a pretext for its true reasons. We are so persuaded ourselves." Appendix at A-7.

By showing Shop 'N Save's articulated reason to be pretextual, Brandt met the requirements of the "pretext only" rule. When the case has reached this point, and Plaintiff has established that the employer's stated reason is not true, it is for the finder of fact, and not the appellate court, to decide whether illegal discrimination is the true reason for the employer's action. Despite the contrary precedent in *Ryther*, Judge Bowman held that this was still not enough to permit the jury to decide whether the true reason for Brandt's non-promotion was sex discrimination. He is once again introducing the concept of "pretext plus" in the Eighth Circuit, despite the Court *en banc's* holding to the contrary in *Ryther*.

However, Brandt went further in her case and also met the requirements of "pretext plus." She offered what Judge Heaney called in his dissent "an arsenal of evidence" above and beyond the elements of her prima facie case. She presented evidence that the job of meat cutter was traditionally filled by men. She presented statistical evidence that of 688 meat cutters in Local 88, only 3 or 4 were women. She presented evidence that at Shop 'N Save most of the "meat clerks" were women. She presented evidence that Shop n' Save had employed only one female meat cutter in its history, and that lone female was employed by defendant as a result of its acquisition of a Kroger Store at which she had been working. She presented undisputed evidence that

the jobs of "meat clerk" and "meat cutter" had almost identical job descriptions, except that a "meat cutter" had to know how to operate a band saw. She presented evidence that "meat cutter" was a higher paying job than "meat clerk." She presented evidence that when she talked with meat supervisor Danny Howard about becoming a meat cutter, they discussed the fact that Shop 'N Save had never hired outright a woman for that position. She pointed out in her letter to Marty that she was female, because she knew she was applying for a job traditionally held by men.

Despite this additional evidence, the majority found that even "pretext plus" was not enough. Although it cited *Rothmeier*, the majority's theory doesn't really fit under the *Rothmeier* exception. Judge Heaney addressed the *Rothmeier* exception in his dissent, noting that because Rothmeier acknowledged he was fired for a non-discriminatory reason, no inference of discrimination remained. "But this is not a *Rothmeier*-type case. Brandt's pretext evidence does not point to a nondiscriminatory reason for passing her over nor has she offered or acknowledged such a justification. Rather, Brandt vigorously maintains that Shop n' Save's decision was actually gender-motivated." Appendix at A-12, 13.

Under the guise of *Rothmeier*, the majority discussed a theory that other circuits have been considering which Petitioner calls "pretext plus the impossible." This theory seems to have gotten new life in *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 65 FEP Cases 1109 (1st Cir. 1994). In a footnote to that case, the First Circuit posed this hypothetical:

> For example, suppose an employee made out a truly barebones prima facie case of age discrimination, and the employer responded that the employee lacked the necessary skills for the job. Suppose also that the *unrefuted evidence* showed that the response was a pretext, because the employer had fired the employee to conceal the

> employer's own acts of embezzlement. In such an instance, there would be a prima facie case at the outset and a disbelieved pretext, but we think it plain that no reasonable jury could find age discrimination on such a record.

Id. at 261 n.3 (emphasis added). This hypothetical follows along the same lines as the reasoning used in *Rothmeier*, in that *unrefuted evidence* would have contradicted an inference of discrimination.

The theory outlined in this footnote was taken a step further in *Wallace v. SMC Pneumatics, Inc.* There, the Seventh Circuit decided that the contradictory evidence need not be presented by the employer at trial. The Court noted:

> The true reason for the action of which the Plaintiff is complaining might be something embarrassing to the employer, such as nepotism, personal friendship, the plaintiff's being perceived as a threat to his superior, a mistaken evaluation, the plaintiff's being a whistle blower, the employer's antipathy to irrelevant but not statutorily protected characteristics, a superior officer's desire to shift blame to a hapless subordinate - conceivably a factor here - or even an invidious factor but not one outlawed by the statute under which the plaintiff is suing; or the true reason might be unknown to the employer or there might be no reason.

Wallace, 103 F. 3d at 399. Thus, the Seventh Circuit is not only requiring a plaintiff to prove "pretext plus;" it is requiring the plaintiff to do the impossible. To prevail under this logic, the plaintiff must not only show the defendant's articulated reason to be pretext, but plaintiff must also be a mind-reader of each of the members of a Court of Appeals, anticipating and refuting any non-discriminatory reason they might come up with, even though no evidence was presented to support these surmised reasons at trial! This puts an impossible burden on a plaintiff.

The Second Circuit's confusing *en banc* opinion in *Fisher* picks up on the Seventh Circuit's "pretext plus the impossible" theory. The majority in *Fisher* theorized:

> In some cases, an employer's proffered reason is a mask for unlawful discrimination. But discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility.

Fisher, 114 F. 3d at 1337.

The majority in *Fisher* went on to find that the fact that the "legitimate reasons" proffered by a defendant, when found to be false, are:

> . . . nothing more than pieces of circumstantial evidence, which may be employed, as in many other types of cases, to reveal the speaker's state of mind. . . And if, on examination of the circumstances, there are many possible reasons for the false explanation, *stated or unstated*, and illegal discrimination is no more likely a reason than others, then the pretext gives minimal support to plaintiff's claim of discrimination.

Id. at 1338 (citing *Wallace* at 1399 and *Woods* at 260-261 n. 3).

What *Wallace* and *Fisher* don't acknowledge, in basing this "pretext plus the impossible" view on *Woods*, is that the *Woods* hypothetical was based on "*unrefuted evidence shown*" at trial which was contradictory to and inconsistent with the claim of discrimination. Thus, *Fisher*, like *Wallace*, stands for the proposition that the Court of Appeals is free to surmise all the possible non-discriminatory reasons a defendant might have

taken the adverse employment action, without the defendant having to produce evidence of these reasons at trial!

In his dissent in *Fisher*, Judge Winter, with whom Judges Newman, Kearse and Cabranes concur, noted that the court *en banc* is unanimous in agreeing that the plaintiff had established a prima facie case and in affirming that a pretext was proffered; however, that is where all agreement ended. He went on to say:

> My colleagues in the majority also hold the following: (a) a Title VII/ADEA plaintiff's presentation of a *McDonnell Douglas* prima facie case will, if the defendant stands mute as to the reasons for the adverse employment decision, result in liability; but, (2) the very same plaintiff's case can, if the defendant responds with a lie, be dismissed on insufficiency grounds. . .an employer who proffers a lie about an adverse employment decision, can, precisely as a result of the act of lying, renew a previously rejected sufficiency challenge to a plaintiff's main case.

Fisher, 114 F. 3d at 1390.

This, of course, is contrary to the standards of appellate review. Parties to appeals have been admonished over the years that they are bound by the theory submitted to the trial court and additional theories cannot be introduced on appeal. As the Third Circuit put it so succinctly, "When a litigant takes an unequivocal position at trial, he cannot on appeal assume a contrary position simply because the decision in retrospect was a tactical mistake, or perhaps a candid but regretted concession." *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 116 (3rd Cir. 1992).

The Second Circuit has also admonished a District Court's post-trial decision which came up with a new theory, stating that the verdict for plaintiff cannot be sustained "on a theory that was never presented to the jury." *Sinclair v. Long Island Railroad*, 985 F.2d 74, 78 (2nd Cir. 1993). And the District of Columbia has held:

> Where plaintiff tries his case on one theory in the District Court, without any indication of other theories, he will not ordinarily be heard to press those theories on appeal. . . A claimant ordinarily cannot expect to lose in the trial court on one theory but win on appeal under another.

Browzin v. Catholic University of America, 527 F.2d 843, 849 n.10, 850 (D.C. Cir. 1975).

In *Brandt*, the majority took the "pretext plus the impossible" theory and added a twist of its own, making it the most extreme of this line of decisions to date. The majority not only relied on a theory the employer had not presented at trial— that same theory had been flatly *denied* by the employer at trial! The majority stated, "It is apparent that the position was created for Frentzel, with the job's 'qualifications' tailored to Frentzel's background, rather than that Frentzel coincidentally and fortuitously happened into a just-created position that required his 'qualifications'." Appendix at A-8. However, Shop 'n Save itself adamantly denied this proposition. When asked at trial if he knew Frentzel was looking for a job when management decided to hire an apprentice meat cutter, he answered, "No." Appendix at A-33. Shop 'N Save also emphasized the opposite in its briefs: "At the time the decision was made to search for an apprentice meatcutter and the qualifications were set, Dougherty had no knowledge that Frentzel (ultimately the successful candidate) was searching for a job." Appendix at A-35 n.8. Again in its Reply Brief, Shop 'n Save denied the majority's factual scenario:

> [T]here is no dispute in the record evidence that the qualifications for this unique apprentice meatcutter position were established and set *prior to* Frentzel entering the picture!! Indeed, it is undisputed that at the time the decision was made to search for an apprentice meatcutter and the qualifications were set, Dougherty had no knowledge that Frentzel was even searching for a job.

Appendix at A-37.

For the majority to formulate what it believes to be the true factual scenario, contrary to what defendant asserted and the judge and jury found, encourages employers to dream up whatever they think may sell to a jury, with no repercussions. If their reason is found by the jury to be pretext, the Court of Appeals can still surmise a theory for the defendant that it did not present at trial, or even one that the defendant contradicted.

Speaking to this issue in his dissent, Judge Heaney, citing *Sheridan*, stated that Shop 'n Save should not benefit from failing to assert the "true" reason for its decision to the district court. As the Third Circuit stated in *Sheridan*:

> We routinely expect that a party give honest testimony in a court of law; there is no reason to expect less of an employer charged with unlawful discrimination. If an employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril. Under those circumstances, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged.

Sheridan, 100 F. 3d at 1069.

From a policy standpoint, the majority's decision actually *rewards* an employer who fabricates evidence on a crucial issue in the case— evidence which the majority itself admits it does not believe. Shop 'n Save must be held to the reasons it asserts for its actions. If the jury finds, as it did here, that defendant has fabricated an explanation for its decision, the employer should have to live with the consequences of its misrepresentation to the court. If the majority's explanation for the selection of Frentzel over Brandt was accurate, then Shop 'n Save should have presented that reason for its decision to the fact-finder, not denied it at trial.

As the Eighth Circuit admonished the District Court in *Krenik:*

> [F]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions... Rather our inquiry is limited to whether the employer gave an honest explanation for its behavior.

Krenik at 960, *citing Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 973, 66 FEP Cases 91 (8th Cir. 1994). Petitioner asks this Court to give the same admonition to the Courts of Appeals: that they are not super-personnel boards, second-guessing, aiding and abetting the business judgment of employers whose articulated "legitimate reasons" turn out to be phony under a jury's close scrutiny.

The jury and judge were exposed to all the same facts that the majority reviewed; they disagreed with Judge Bowman's view, and found unanimously that a motivating factor in Shop 'n Saves' decision to overlook Brandt and hire the less qualified Frentzel was her sex. This is clearly a situation where the appellate court has usurped the fact-finding function. As Judge Heaney put it, "There is no basis in the record for the majority's speculation. Even if there were, however, it would be for the factfinder— not this court— to consider in determining the employer's motive." Appendix at A-13.

The time is ripe for this Court to revisit the issues first raised in *Hicks.* While the Third and Eighth Circuits *en banc* are in agreement on the "pretext only" view, they conflict with the Second and Fifth Circuits' *en banc* decisions. The Second Circuit in *Fisher* has digressed on this issue to such an extent that its *en banc* members are furiously arguing even basic concepts of employment discrimination law. The writers of the majority, concurring and dissenting opinions cannot even agree on the meaning of terms such as prima facie case, presumptions, burden of production, and pretext, much less the direction they were

given by *Hicks*. Confusion reigns supreme, and only this Court can correct its excesses. Petitioner anticipates that in *Fisher*, a petition for certiorari may well follow her own. Although for the reasons stated above, Petitioner believes this case is the one for which this Court should grant certiorari, Petitioner believes that as an alternative, *Brandt's* petition should be granted in tandem with *Fisher*, so that the injustice done in both cases can be corrected.

CONCLUSION

The Supreme Court must correct the erroneous view of the majority in *Brandt*. Petitioner made her prima facie case, and showed to all, including the majority, that the employer's reasons were pretext. Under a majority of the circuits, which hold the "pretext only" view, this is enough for this matter to go to the jury. But Petitioner went beyond that and introduced additional evidence of discrimination. She thus met the burden of proof espoused by the "pretext plus" circuits as well. She was awarded back pay by the jury, reinstatement, punitive damages and attorneys fees by the judge. The Eighth Circuit, by a divided panel, with a strenuous dissent, reversed the judgment of the factfinders. Instead, it offered its own conclusion of the real reason that the employment action was taken, thus following the "pretext plus the impossible" standard already adopted in the Second and Seventh Circuits. The Eighth Circuit carried that standard to the extreme by adding its own twist, surmising on appeal a non-discriminatory reason that Shop 'N Save had explicitly denied at trial.

Petitioner asks this Court to clarify its decision in *Hicks* by adopting the view stated so succinctly by the Eleventh Circuit in *Combs*, that a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact to the truth of each of the employer's proffered reasons for its challenged

action. Petitioner further asks this Court to admonish the Courts of Appeals that in its review of these matters, they must stick to the evidence produced by the parties at trial.

Respectfully Submitted,

William E. Moench*
Mo. Bar No. 34420
Mary Anne Sedey
Mo. Bar No. 26731
Sedey, Moench & Associates, P.C.
3030 South Grand
Suite 200
St. Louis, Missouri 63118
(314) 773-3566

Attorneys for Petitioner

*Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 95-3430/3744

Kimberly Brandt,
Appellee,

v.

Shop 'n Save Warehouse Foods, Inc.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: May 16, 1996
Filed: March 17,1997

Before BOWMAN, HEANEY, and WOLLMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Shop 'n Save Warehouse Foods, Inc., a grocery chain operating stores in the St. Louis metropolitan area, appeals from the judgment of the District Court in favor of Kimberly Brandt on her claims of sex discrimination. We reverse.

Brandt, a member of the United Food and Commercial Workers (UFCW) Local 88 labor union, worked as a "casual" meat wrapper out of the union hall from 1987 to July 1991.[1] That is, she worked for Shop 'n Save and other grocery stores on an "as

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[1] The 1993 UFCW Local 88 collective bargaining agreement with Shop 'n Save now calls the meat wrapper position "meat clerk," and has broadened the job description to include all duties previously assigned the "meat cutter" position, except operating a band saw.

needed," temporary basis.[2] The Shop 'n Save employees who knew Brandt and worked with her, without exception, praised her work. In August 1990, Brandt sent a letter to Richard Marty, then acting senior vice president of human resources for Shop 'n Save, and a similar letter to Harold "Butch" Covili, Shop 'n Save's senior vice president of operations, expressing interest in joining Shop 'n Save as a permanent employee, in a position as, in her words, a "female apprentice meat cutter," or in front-end management or co-management. As a courtesy, Marty interviewed Brandt on September 7, 1990, and told her then and in a follow-up letter dated ten days later that Shop 'n Save did not have a position to offer her. Marty's letter said Brandt's resume would be retained in Shop 'n Save's "active files" for one year. Brandt testified that, in the same time frame, she also told Danny Howard, who was one of three "meat specialists" each assigned to supervise meat operations at approximately one-third of Shop n' Save's twenty-eight stores, of her interest in an apprentice meat cutter position with Shop 'n Save. As of trial, Shop 'n Save had only one female meat cutter, who had been hired by the company when it acquired a Kroger store where she was employed. The evidence also shows that, of the 600-650 meat cutters on Local 88's membership roster at that time, only three or four were female.

In May 1991, Marty hired John Dougherty to fill the position of senior vice president of human resources, the position Marty himself had been holding temporarily, and Marty returned to his position with Shop 'n Save's parent corporation. At this time, Covili also was no longer working in Shop 'n Save's St. Louis office. So Marty and Covili were out of the picture as far as the day-to-day operations of Shop 'n Save's St. Louis area stores were concerned, but Howard, who also knew of Brandt's ambitions, was still working for the company as a meat specialist.

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[2] In July 1991, Brandt was hired by Shop 'n Save as a permanent employee, working as a meat wrapper (now meat clerk).

During the month of May, after Dougherty was hired, the events leading up to Brandt's lawsuit transpired, although the record does not establish a precise sequence.

Sometime during the month, after Dougherty assumed his duties, he received a call from Bob Frentzel, an old friend he had known since 1966. Frentzel had experienced some employment setbacks since 1988, and in fact had been unemployed for five months before he called Dougherty. He sought whatever employment assistance Dougherty could offer. Also in May, Dougherty, together with Bill Fant, Shop 'n Save's meat manager, who had overall responsibility for the meat departments in all area stores, decided to hire an apprentice meat cutter, someone with management experience and "some college," but not necessarily any meat experience. The apprentice meat cutter job description in the UFCW Local 88 contract with Shop 'n Save in effect at that time did not say that the apprentice position was a management position, nor did the job description give any indication that any college education would be preferred, much less required, of the successful meat cutter apprentice. Dougherty and Fant's ostensible goal, however, was to move the person who was hired for the job into management after the two-year meat cutter apprenticeship was completed. This was the first time (and the last, as it turns out) that Shop 'n Save created an apprentice meat cutter position, although the union contract allowed one such position in each store if Local 88 gave its permission, as it did in this case.

In hiring a person to fill this new job, Dougherty and Fant never searched the "active files" for potential candidates who might have applied for employment with Shop 'n Save before the apprentice position was created. The job was never posted or otherwise advertised. Frentzel was the only person interviewed or even considered to fill the position. Dougherty, Fant, and Howard (who reported to Fant) all participated in the hiring of Frentzel. Frentzel had management experience, although not for

several years; he had "some college," although serious doubt was cast upon both just how much "some" is and the extent to which the decision-makers were genuinely interested in that aspect of Frentzel's background; and he had virtually no meat experience. Brandt had neither management experience nor "some college," but she did have extensive meat experience. By June 3, 1991, Bob Frentzel was on the job in the apprentice position, at the Shop 'n Save store where Brandt happened to be working as a meat wrapper out of the union hall. As of the date of trial on Brandt's claims, three and one-half years after he was hired and one and one-half years after he completed the apprentice program, Frentzel had not been promoted to a management position, despite the fact that Shop 'n Save had filled several openings for such positions with other individuals.

The same day Frentzel went to work for Shop 'n Save, Brandt confronted Dougherty and told him she had previously submitted a resume and had expressed an interest in a position as an apprentice meat cutter. She told Dougherty she believed his failure to consider her for the apprentice job was sex discrimination. Two weeks later, Brandt filed a charge of employment discrimination against Shop 'n Save with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights. Brandt filed suit against Shop 'n Save in May 1992, alleging sex discrimination and retaliation in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17, and the comparable Missouri employment discrimination law, Mo. Rev. Stat. §§ 213.010-.126. Trial was held before a jury and, by consent of the parties and pursuant to 28 U.S.C. § 636(c), before a magistrate judge. The jury found for Shop 'n Save on Brandt's claim of retaliation, but for Brandt on her claim of sex discrimination. The jury further determined that Shop 'n Save's conduct in this matter was such that punitive damages were warranted. In addition, in derogation of the court's instructions, the jury specified not only an amount of punitive damages (which was supposed to be determined in a later proceeding and for which

the jury had no evidence), but also that Shop 'n Save should pay Brandt's attorney fees. After disposing of post-trial motions, the Magistrate Judge entered judgment on the jury's verdict, awarding Brandt equitable relief and $22,500 in compensatory damages. The court also awarded Brandt $35,000 in punitive damages and $39,852.25 in attorney fees and costs. Judgment was entered in favor of Shop 'n Save on Brandt's claim of retaliation. Shop 'n Save appeals.

For its first issue on appeal, Shop 'n Save contends that the court erred in denying its motion for judgment as a matter of law (JAML). We review *de novo*, "applying the same standard as the district court and overturning the verdict only if the evidence, viewed in the light most favorable to the nonmoving party, is insufficient to support the verdict." *Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 507 (8th Cir. 1996), *petition for cert filed*, 65 U.S.L.W. 3587 (Feb. 5, 1997) (No. 96-1304). We have recited the facts in this opinion mindful of that standard, but we have omitted those facts relating to Brandt's retaliation claim, the adverse judgment on which Brandt does not appeal.

Shop 'n Save makes a two-part argument on its JAML issue. First, the company claims that Brandt failed to prove a prima facie case of sex discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and its progeny.[3] In the event we disagree and conclude that Brandt proved her prima facie case, Shop 'n Save alternatively argues that Brandt did not sustain her ultimate burden of proof under *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). That is, Shop 'n Save contends it answered Brandt's prima facie case with legitimate

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[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), sets out the analysis to be applied to cases where the proof of alleged discrimination is circumstantial. Brandt makes no claim that there is direct evidence Shop 'n Save discriminated against her, so the *McDonnell Douglas* framework is appropriate here.

reasons for its actions, and that she was unable to show those reasons were a pretext for intentional discrimination. Because we conclude as a matter of law that Brandt did not prove that her gender was a motivating factor in Shop 'n Save's decision to hire Frentzel instead of her, we do not consider the challenged aspects of the prima facie case. We assume for purposes of this appeal that Brandt proved a prima facie case of sex discrimination by a preponderance of the evidence.

Once the employee offers sufficient evidence to establish a prima facie case of unlawful discrimination, it becomes the employer's burden to produce evidence that it had legitimate, nondiscriminatory reasons for its actions. *Hicks*, 509 U.S. at 507. If it does so, the "presumption [of discrimination] raised by the prima facie case is rebutted." *Id.* (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981)) (alteration added by this Court). The burden of persuasion--"the ultimate burden" — then moves to the employee to prove that the employment action in question was taken at least in part because of her sex. *Id.* In this phase of the case, the employee ordinarily attempts to prove that the employer's articulated reasons are pretextual, thus raising the inference that sex was a motivating factor for the adverse employment action. But it is not enough that the employee submit evidence of pretext such that the jury disbelieves the defendant's "legitimate" reasons. *See O'Bryan v. KTIV Television*, 64 F.3d 1188, 1192 (8th Cir. 1995) ("[A] plaintiff's proof of pretext, with respect to the defendant's proffered reason for its actions, is relevant to, *but not dispositive of*, the ultimate issue of intentional discrimination.") (emphasis added). "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of [sex] is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review...." *Hicks*, 509 U.S. at 524. We conclude, after *de novo* review and giving Brandt the benefit of all reasonable inferences that might be drawn from the evidence, that the jury's

finding of unlawful discrimination cannot be sustained as there is insufficient evidence to support it, and that Shop 'n Save was entitled to judgment as a matter of law on Brandt's claims of sex discrimination.

Shop 'n Save contends that it proffered a legitimate reason for hiring Frentzel instead of Brandt. According to the company, Brandt was not qualified to fill the apprentice position as it was conceived by Dougherty and Fant, because she had neither management experience nor "some college." We have carefully reviewed the record in this case, and we are confident that the jury easily might have found that Shop 'n Save--Dougherty specifically, with Fant's assistance--created the apprentice meat cutter position and its qualifications with the express purpose of hiring Frentzel to fill it, that is, that Shop n' Save's proffered "legitimate reason" was a fabrication, a pretext for its true reasons. We are so persuaded ourselves. But notwithstanding Shop 'n Save's arguable dissembling about its reasons for hiring Frentzel, we do not believe that Brandt has met her burden of proving that the pretext was intended to conceal unlawful discrimination or that her gender in any way motivated the hiring of Frentzel instead of Brandt. The "fact sensitive" issue at this stage of the analysis is "whether the employee has provided evidence from which a reasonable factfinder could conclude that the employer intentionally discriminated against the employee for a prohibited reason." *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1334 (8th Cir. 1996). We hold that she has not.

The evidence shows that Frentzel took advantage of his "network" to land the apprentice meat cutter position, and that Dougherty obliged his friend by supporting his application for the position, if not creating a tailor-made position for Frentzel. We do not condone the exclusion of Brandt as a viable candidate on this basis. But it is not intentional sex discrimination for Dougherty to hire an unemployed old friend who happens to be male, without considering an applicant who is neither unem-

ployed nor an old friend and happens to be female. An employer's business decision concerning hiring need not be a good decision to withstand a challenge for sex discrimination; it is enough that it not be motivated by the gender of the employee who is adversely affected by the decision. The proof at trial was that Shop 'n Save had hired no males *or* females to be apprentice meat cutters before Frentzel, and has hired none since. It is apparent that the position was created for Frentzel, with the job's "qualifications" tailored to Frentzel's background, rather than that Frentzel coincidentally and fortuitously happened into a just-created position that required his "qualifications." The fact that Frentzel has yet to be promoted to a management position lends credence to that inference. But such actions, although unfair from the standpoint of Brandt and persons of either gender who are similarly situated, are not a violation of state and federal laws prohibiting sex discrimination in employment. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995) ("[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination."). The evidence suggests that at no time during the proceedings did Shop 'n Save fully acknowledge the reasons Frentzel was selected to fill the apprentice meat cutter position, and the jury evidently found the company's prevarication not at all to its liking. Nevertheless, no reasonable jury could have found that Frentzel was hired to the exclusion of Brandt because Brandt is female. *See Gathright v. St. Louis Teacher's Credit Union*, 97 F.3d 266, 268 (8th Cir. 1996) (stating that denial of motion for JAML should be affirmed "if a reasonable jury could differ as to the conclusions that could be drawn"). Shop 'n Save thus is entitled to judgment as a matter of law.

Nothing in our recent *en banc* decision in *Ryther v. KARE 11*, No. 94-3622 (8th Cir. Mar. 6, 1997), requires a contrary conclu-

sion. This is a case "where the evidence of pretext is inconsistent with an inference of intentional discrimination.." *Id.*, slip op. at 7 n.2. Of course, Brandt was free to "rely on the same evidence to prove both pretext and discrimination." but that does not prevent our reversal of the denial of Shop 'n Save's motion for JAML where "the evidence is insufficient for a reasonable trier of fact to infer unlawful discrimination." *Id.* at 35 n.13 (Loken, J., in a partial separate concurrence commanding a majority of the Court *en banc.*)

Shop 'n Save raises a number of other issues in its appeal. Because of our disposition of the first issue, it is unnecessary for us to consider those that remain.

The judgment of the District Court is reversed and the case is remanded with instructions for the court to enter judgment for Shop 'n Save.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. The majority concedes that Brandt established a prima facie case of sex discrimination and that she presented sufficient evidence for a factfinder to conclude that the employer's proffered reason for hiring Frentzl was a pretext for its true reason. Yet the majority speculates as to the employer's actual motivation and concludes that Brandt's discrimination claim should not have even survived a motion for JAML. Our court should not engage in such conjecture, which are essentially independent credibility determinations. Rather, because Brandt presented more than adequate evidence of sex discrimination to go to a factfinder, I would affirm the jury verdict and judgment of the district court in favor of Brandt.

Brandt established the elements of a prima facie case of sex discrimination. First, as a woman, Brandt is a member of a protected class. Second, she applied for and was qualified for the position of an apprentice meat cutter. In August 1990, Brandt

submitted an application to Shop 'n Save for the position and her four-year experience as a meat clerk prepared her for nearly all of the necessary duties of a meat cutter and certainly of an apprentice. Third, despite Brandt's qualifications, she was rejected in favor of a male applicant under circumstances that give rise to an inference of unlawful discrimination. At the time she submitted her application, she interviewed for the position and was told that although the company could not hire her at the time, her application would remain in the active file for one year. Less than a year after Brandt's interview, Shop 'n Save hired Frentzl, who had not even filled out an employment application and who had absolutely no meat-cutting experience. Under the *McDonnell-Douglas* framework, Brandt's establishment of a prima facie case created a legal presumption of sex discrimination that, if unrebutted, would have entitled her to judgment as a matter of law. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

To prevent entry of such judgment, Shop 'n Save had the burden to articulate a legitimate, nondiscriminatory reason for its actions. The company stated that it hired Frentzl rather than promote Brandt because Frentzl had management experience and some college education and because the decisionmakers were not even aware that Brandt was an applicant for the position when Frentzl was hired. At this point, the legal *presumption* of discrimination from Brandt's prima facie case disappeared; yet, as our court recently clarified en banc, the elements of the prima facie case remain as evidence from which the factfinder may *infer* discrimination. *Ryther v. KARE 11*, No. 94-3622, slip op. at 5-6. (8th Cir. Mar. 6, 1997) (citing *Hicks*, 509 U.S. at 511). As Justice Powell has explained:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimi-

> nation arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Texas v. Burdine, 450 U.S. 248, 255 n.10 (1991); *see also Sheridan v. E. I. DuPont de Nemours & Co.i*, 100 F.3d 1061, 1069 (3d Cir. 1996) (en banc).

In addition to her prima facie case, Brandt presented an arsenal of evidence to discredit Shop 'n Save's articulated reasons for hiring Frentzl. She alleged that Shop 'n Save pre-selected Frentzl for the position and tailored the job qualifications to fit him. Frentzl was the only person Shop 'n Save ever hired for the apprentice position with the "special" job qualifications. Further, it is questionable whether Frentzl even possessed the qualifications for which he was allegedly hired or, as the majority notes, that the decisionmakers actually had any interest in his education or management experience. Evidence of pre-selection and the creation of a position tailored to Frentzl's qualifications reasonably and effectively could have discredited Shop n' Save's explanation. *See Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721, 729 (8th Cir. 1982). Moreover, Shop 'n Save's decision cannot be defended on the basis of the relative qualifications of the applicants if those qualifications were not even considered. *See Easland v. Tennessee Valley Auth.*, 704 F.2d 613, 625 (11th Cir. 1983). Further calling into question the veracity of Shop 'n Save's proffered reason, three and a half years after the company hired Frentzl it had yet to promote him to a management position. Brandt also introduced evidence that the majority of Shop 'n Save's meat clerks were female and, at the time of trial, Shop 'n Save had only hired one female meat cutter. The evidence that

Shop 'n Save has consistently maintained a workforce segregated by gender further buttressed Brandt's discrimination claim. *See Lams v. General Waterworks Corp.*, 766 F.2d 386 (8th Cir. 1985).

Brandt's strong challenges to the defendant's proffered reasons provided additional evidence from which the factfinder could have inferred that Shop 'n Save's decision was actually motivated by discrimination. As our court en banc just restated:

> "[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reasons, based his decision on an impermissible consideration such as [sex]."

Ryther, No. 94-3622, slip op. at 6 (quoting *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1977)). Or, as Judge Posner put it in his decision for the Seventh Circuit en banc, "If the employer offers a pretext--a phony reason--for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was [sex]." *Visser v. Packer Eng'g Assoc.*, 924 F.2d 655 (7th Cir. 1991) (en banc).

I recognize that evidence of pretext may not support a reasonable inference of discrimination in some cases. "[E]vidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination." *Ryther*, No. 94-3622, slip op. at 7. For example, in *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996), where the employee discredited the employer's reason for his discharge by acknowledging that he was fired for confronting his employer about alleged SEC violations, clearly no inference of discrimination remained. *Id.* at 1335. But this is not a *Rothmeier*-type case. Brandt's pretext evidence does not point to a nondiscriminatory reason for passing her over nor has she offered or acknowledged such a

justification. Rather, Brandt vigorously maintains that Shop 'n Save's decision was actually gender-motivated.

Shop 'n Save has consistently argued that it hired Frentzl because he was more qualified and because the decisionmakers did not know Brandt was an applicant, asserting this position to the district court before, during, and after the trial, and continuing to do so before this court. Neither the jury, in considering the MHRA claim, nor the district court for the Title VII claim accepted this explanation. Nor does the majority, explicitly finding that the defendant's articulated reasons for hiring Frentzl were fabricated. Yet, after discrediting Shop 'n Save's given reason, the majority creates its own, nondiscriminatory explanation for the defendant's employment decision. The majority reaches out and speculates that Frentzl was actually hired because of Dougherty's loyalty to an old friend. If Shop 'n Save's reason for hiring Frentzl was as the majority determined, Shop 'n Save could have and should have advanced this reason before the trial court, where it could have been subjected to a legitimate inquiry. Shop 'n Save should not benefit from failing to assert the "true" reason for its decision to the district court. As the Third Circuit stated:

> We routinely expect that a party give honest testimony in a court of law; there is no reason to expect less of an employer charged with unlawful discrimination. If the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril. Under those circumstances, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged.

Sheridan, 100 F.3d at 1069. There is no basis in the record for the majority's speculation. Even if there were, however, it would be for the factfinder — not this court — to consider in determining the employer's motive. We need not decide whether a non-

business-related reason for rejecting a qualified woman in favor of a less qualified, personal friend of a supervisor may ever be the basis for a summary judgment against such a claimant. Suffice it to say that Shop 'n Save's articulated reason smacked of pretext, and it was proper for the factfinder to infer that its real motivation was as Brandt charged.

The properly instructed jury determined that Shop 'n Save discriminated against Brandt on the basis of her sex in violation of the MHRA. The district court then made specific findings of fact and independently determined that Shop 'n Save similarly violated Title VII. We should not reverse the verdicts for insufficient evidence unless, after viewing the evidence in the light most favorable to the verdicts, no reasonable factfinder could have returned a verdict for the nonmoving party. *Ryther*, No. 94-3622, slip op. at 4. The district court properly denied Shop 'n Save's motion for JAML. I would affirm the court in all respects and award Brandt the damages to which she is entitled.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3430/3744

Kimberly Brandt,
Appellee,

vs.

Shop 'n Save Warehouse Foods, Inc.,
Appellant.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge McMillian, and Judge Hansen would grant the suggestion.

The petition for rehearing by the panel is also denied.

May 6, 1997

Order entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

92CV1012TIA

KIMBERLEY BRANDT,
Plaintiff,

v.

SHOP 'N SAVE WAREHOUSE FOODS, INC.,
Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff Kimberley Brandt's complaint filed on May 28, 1992, in which she alleged that the defendant had unlawfully discriminated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the Missouri Human Rights Act, RS.Mo. §213.010 *et seq.* (1986). Plaintiff further alleged that defendant failed to promote her in retaliation for her having filed charges with the Equal Opportunity Employment Commission (hereinafter "EEOC") and the Missouri Human Rights Commission (hereinafter "MHRC") in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the Missouri Human Rights Act, RS.Mo. §213.010 *et seq.* (1986). Plaintiff sought injunctive relief in the form of instatement and lost wages and benefits.

On October 24, 1994, the Court, sitting with a jury, commenced a trial in this matter. On October 27, 1994, the jury returned a verdict for the plaintiff on her sex discrimination claim under the Missouri Human Rights Act and against the plaintiff on her claim of retaliation under the same Act. The jury awarded plaintiff $22,500 in actual damages and $35,000 in

punitive damages. As to plaintiff's claims of sex discrimination and unlawful retaliation under Title VII of the Civil Rights Act of 1964, the undersigned makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the Missouri Human Rights Act, RS.Mo. §213.010 *et seq.*

2. Plaintiff Kimberley Brandt is a female citizen of the United States, and resides in Wood River, Illinois.

3. Defendant Shop 'N Save Warehouse Foods, Inc. is a Missouri corporation authorized to do business in the State of Missouri and is engaged in interstate commerce, all within the Eastern District of Missouri.

4. At all times material to this lawsuit, defendant employed fifteen or more persons for each working day of twenty (20) or more calendar weeks.

5. Plaintiff alleged in her complaint that defendant failed to hire her as an apprentice meat cutter because of her sex.

6. Richard Marty acted as defendant's Senior Vice President of Human Resources from May 1990 until he hired John Dougherty to fill that position in May 1991.

7. Senior Vice President of Human Resources is the most senior position in defendant's Human Resources Department.

8. Bill Fant was defendant's company-wide Meat Manager at all times material to this lawsuit.

9. Danny Howard was a Meat Specialist and assistant to Bill Fant at all times material to this lawsuit.

10. Harold "Butch" Covili was defendant's Senior Vice President of Operations for approximately two (2) years, up to and including June 1991.

11. Plaintiff, a member of United Food and Commercial Workers (hereinafter "UFCW") Local 88, worked out of the Union's hiring hall as a Meat Wrapper (now "Meat Clerk") for defendant on a temporary basis from 1987 to July 1991.

12. In August 1990, plaintiff expressed to defendant a desire to become employed by defendant as an Apprentice Meat Cutter. Specifically, plaintiff directed a letter to Richard Marty, defendant's Senior Vice President of Human Resources, and to Harold "Butch" Covili, defendant's Senior Vice President of Operations.

13. Richard Marty conducted an employment interview with plaintiff on September 7, 1990.

14. By letter dated September 17, 1990, Richard Marty informed plaintiff that defendant was unable to offer her employment at that time but that her application and resume would be retained in defendant's active files for a period of one (1) year.

15. Defendant's "active files" are those files which are retained to assist defendant in the search for applicants who might fill an employment need.

16. John Dougherty succeeded Richard Marty as Senior Vice President of Human resources in May 1991. John Dougherty had 20 years of experience in the field of human resources such that he would know what an active file was.

17. Subsequent to her interview with Richard Marty in September 1990, plaintiff spoke with Danny Howard, assistant to Meat Manager Bill Fant, and again expressed interest in becoming an Apprentice Meat Cutter with defendant. Danny Howard thus knew that plaintiff was interested in becoming an Apprentice Meat Cutter.

18. In May 1991, Meat Manager Bill Fant told John Dougherty that defendant needed an Apprentice Meat Cutter. At approximately the same time, John Dougherty learned that Bob Frentzel was looking for work. Consequently, John Dougherty recommended that defendant hire Bob Frentzel as an Apprentice Meat Cutter.

19. John Dougherty and Bob Frentzel had been friends since 1966.

20. Pursuant to the recommendation of John Dougherty, Bill Fant and Danny Howard interviewed Bob Frentzel for the position of Apprentice Meat Cutter. At this time, Bob Frentzel had not completed an application for employment with defendant.

21. John Dougherty, Bill Fant, and Danny Howard subsequently decided to hire Bob Frentzel as an Apprentice Meat Cutter.

22. John Dougherty, Bill Fant, or Danny Howard never interviewed plaintiff for the position of Apprentice Meat Cutter.

23. On June 3, 1991, plaintiff learned that Bob Frentzel had been hired as an Apprentice Meat Cutter when he reported to work for his first day of training at defendant's Ellisville, Missouri store. Plaintiff was working at defendant's Ellisville, Missouri store as a part-time Meat Wrapper (now Meat Clerk) at that time.

24. On that same date, plaintiff confronted John Dougherty about hiring an Apprentice Meat Cutter without giving her an opportunity to apply or be interviewed for the position, specifically referring to the fact that she had previously submitted an application and resume.

25. On June 17, 1991, plaintiff filed a charge of sex discrimination against defendant with the EEOC and the MHRC.

26. As Vice President of Human Resources, John Dougherty assumed responsibility for processing plaintiff's EEOC and MHRC charges.

27. At John Dougherty's direction, defendant submitted a position statement to the EEOC and the MHRC in which it stated that, in hiring an Apprentice Meat Cutter, it was seeking a candidate for a management position. Essentially, defendant claimed that Bob Frentzel would be promoted to Meat Manager upon completion of the two-year apprenticeship training program.

28. Defendant subsequently claimed that, in hiring an Apprentice Meat Cutter, it was seeking an applicant with no meat background, but with management experience and higher education. Bob Frentzel met these qualifications; plaintiff did not.

29. At the time of trial, which was approximately three and one half years after Bob Frentzel was hired, he had not been promoted to Meat Manager (or any other management position).

30. Bob Frentzel was the only individual to have ever been hired by defendant as a "special" Apprentice Meat Cutter (no meat background, management experience, higher education, promotion to follow two-year apprenticeship training program).

31. Pursuant to the Collective Bargaining Agreement (hereinafter "CBA") between defendant and UFCW, in effect at the time of Bob Frentzel's hiring, an Apprentice Meat Cutter is "a person learning all the details and developing manual skill for performing, after a stated number of years training, the duties of a journeyman meat cutter."

32. Pursuant to the CBA between defendant and UFCW, a Journeyman Meat Cutter is "a professional meat cutter who has either served as an apprentice in accordance with the period of time as set forth in this Agreement or is qualified as a skilled meat cutter. He must be able to perform all of the following duties:

prepare all cuts of meat, including blocking out sides of beef; weigh, price, wrap, cut, and slice any meat; serve trade; grind meat, cube steaks, and patty steaks; prepare merchandise for wrappers; use all tools, including power tools (saws, hand or power), grinders, cubing machine, patty machine, sealer, Bar-B-Q equipment, wrapping machine, conveyor equipment; clean all equipment and tools and be qualified to receive merchandise."

33. In 1993, defendant and UFCW entered into a new CBA. The only change of consequence to this litigation was that the title "Meat Wrapper" was changed to "Meat Clerk". The duties of a Meat Clerk "include all duties of a Journeyman or Service Meat Journeyman except for the using of the band saw."

34. Defendant did not reduce to writing any additional qualifications and/or prerequisites for the position of Apprentice Meat Cutter.

35. Plaintiff has consistently performed all the duties of a Meat Wrapper (now Meat Clerk) well throughout her employment with defendant.

36. Plaintiff was qualified to perform the duties of an Apprentice Meat Cutter (as defined in the CBA) at the time Bob Frentzel was hired by defendant for that position.

37. Defendant justified its decision not to hire plaintiff for the position of Apprentice Meat Cutter by stating that it was seeking an applicant with higher education and management experience, which plaintiff did not have.

38. Defendant has never hired a female Meat Cutter. The only female Meat Cutter currently employed by defendant was brought in with the purchase of an existing store. The great majority of defendant's Meat Wrappers (now Meat Clerks) are female.

39. Defendant's articulated justification for not hiring plaintiff to the position of Apprentice Meat Cutter was a pretext for the true reason(s) for this employment action.

40. The jury found, and this Court finds, that a motivating factor in defendant's decision not to award plaintiff the position of Apprentice Meat Cutter was her sex.

41. The jury found, and this Court finds, that defendant's conduct was intentional, and was outrageous because of evil motive or reckless indifference to plaintiff's right not to be discriminated against on the basis of her sex.

42. The jury found that defendant did not illegally retaliate against plaintiff for filing charges with the EEOC and the MHRC.

43. From June 1993 to September 1994, defendant has paid Bob Frentzel wages that exceed those paid to plaintiff by $18,755.15. Since September 1994, defendant has continued to pay Bob Frentzel a higher wage at a difference of approximately $150.00 per week. In addition, while Bob Frentzel received health insurance benefits from defendant since the time he became employed, plaintiff received no such benefits until she too became a full-tune employee. Plaintiff purchased health insurance during this time for approximately $4,000.000. [sic]

44. The jury found, and this Court finds, that a reasonable approximation of the value of the wages and benefits paid by defendant to Bob Frentzel in excess of those paid to plaintiff is $22,500.00.

45. The jury found that, in order to punish the defendant and to deter the defendant and others from like conduct in the future, an appropriate award of punitive damages was $35,000.00.

46. The parties have stipulated that, had the trial reconvened for a determination of punitive damages, the punitive damage award would have been $35,000.00.

47. Plaintiff remains interested in becoming employed by defendant as a Meat Cutter and wishes to complete defendant's two-year apprentice training program.

CONCLUSIONS OF LAW

48. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1343(a)(4) and 42 U.S.C. §2000e-5(f)(3). Defendant is an employer within the meaning of 42 U.S.C. §2000e (b) and the Missouri Human Rights Act, RS.Mo. §213.010(6) (1986). Plaintiff is an employee within the meaning of 42 U.S.C. §2000e{f) and the Missouri Human Rights Act, RS.Mo. §213.055 (1986).

49. Venue is properly within the Eastern District of Missouri pursuant to 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. §1391.

50. In order to prevail on a claim of sex discrimination under Title VII, plaintiff must first make out a *prima facie* case of sex discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1983). Plaintiff must prove by a preponderance of the evidence that: (1) she is a woman (member of a protected class); (2) she applied and was qualified for the position of Apprentice Meat Cutter; (3) despite her qualifications, she was rejected; and (4) after her rejection, the position remained open and defendant continued to seek applicants from persons of plaintiff's qualifications. *Id.* at 802. Put another way, plaintiff must prove "that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094 (1981); *see also McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 510 (8th Cir. 1995) (citing *Davenport v. Riverview Gardens School*, 30 F.3d 940, 944 (8th Cir. 1994); *Craik v. Minnesota State University Board*, 731 F.2d 465, 469 (8th Cir. 1984)).

51. The jury found, and this Court finds, that plaintiff has made a *prima facie* case of sex discrimination under *McDonnell*

Douglass and *Burdine*, Plaintiff produced evidence sufficient to prove that: (1) she was and is a member of a protected class (women); (2) at the time it decided to hire Bob Frentzel as an Apprentice Meat Cutter, defendant knew that plaintiff was also interested in becoming an Apprentice Meat Cutter, that she had previously been interviewed for that position, and that her resume and application for that position were retained by defendant in its active files; (3) by virtue of her training and experience, plaintiff was qualified for the position of Apprentice Meat Cutter as defined by the CBA between defendant and UFCW Local 88; and (4) considering the fact that Bob Frentzel had no prior meat experience or training, plaintiff was at the very least as qualified as Bob Frentzel for the position of Apprentice Meat Cutter. In combination, these facts form more than a sufficient basis for inferring that plaintiff was not hired because of her sex.

52. Once plaintiff has made her *prima facie* case of sex discrimination, the burden shifts to defendant to articulate some legitimate, nondiscriminatory reason for its decision not to hire her as an Apprentice Meat Cutter. *Burdine* at 253, 101 S.Ct. at 1093; *McDonnell Douglass* at 802, 93 S.Ct. at 1824; *see also Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1310 (8th Cir. 1995); *Krenik v. County of Le Sueur*, 47 F.3d 953, 958 (8th Cir. 1995). Upon production of such evidence, the burden shifts back to plaintiff to prove that defendant's articulated reason is pretextual and that the decision was instead motivated, at least in part, by plaintiff's sex. *Id.*

53. In this case, defendant met its burden of production (articulating a legitimate, non-discriminatory reason for failing to hire plaintiff as an Apprentice Meat Cutter) by stating that plaintiff lacked the higher education and management experience which defendant thought necessary for the "special" Apprentice Meat Cutter position for which it was seeking applicants. However, the jury found, and this Court finds, that plaintiff proved by a preponderance of the evidence that

defendant's articulated reason was pretextual and that plaintiff's sex was a motivating factor in the decision. The Court bases this conclusion on the following application of the law to facts proven by plaintiff:

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981), the United States Supreme Court described the alternative methods of proof available to Title VII plaintiffs in discharging their ultimate burden of proof under the *McDonnell Douglass* model:

> "[Plaintiff] may succeed in [persuading the court that s/he has been the victim of intentional discrimination] either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglass [Corp. v. Green]*, 411
>
> U.S. at 804-5, 93 S.Ct. at 1825-26."

Id. at 256, 101 S.Ct. at 1095 (emphasis added). In *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993), the Court further refined its description of the sufficiency of circumstantial evidence required to support a finding of intentional discrimination under Title VII:

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . ., upon such rejection, '[n]o additional proof is *required*, [*Hicks v. St. Mary's Honor Center*,] 970 F.2d [487], at 493 [(8th Cir. 1992)] (emphasis added)."

113 S.Ct. At 2749; *see also Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1109 (8th Cir. 1994). Thus, the trier of fact in a Title VII case may find intentional discrimination if plaintiff has proved: (1) the elements of a *prima facie* case; and (2) that defendant's proffered justification for its challenged action was pretextual. *Gaworski* at 1109.

In this case, the Court has determined that plaintiff has made a *prima facie* case of sex discrimination (*see* ¶50, 51). In addition, plaintiff has proven facts sufficient to support a finding that defendant's articulated justification for not hiring her as an Apprentice Meat Cutter were purely pretextual, that defendant created additional qualifications for a "special" Apprentice Meat Cutter position so as to exclude the possibility that plaintiff, a woman, might qualify.

Notwithstanding plaintiff's inability to prove by a preponderance of the evidence that the qualifications of managerial experience and higher education were set before or after Bob Frentzel was hired (or before or after plaintiff filed charges with the EEOC and the MHRC), the fact remains that such qualifications appear nowhere in the conventional job description of an Apprentice Meat Cutter (*see* ¶31, 32). In fact, Bob Frentzel was the only individual to have ever been hired by defendant as an Apprentice Meat Cutter pursuant to these additional qualifications. Similarly, plaintiff was the only individual to have ever been rejected for that position pursuant to these qualifications (this despite the fact that, by virtue of her extensive meat background, she was far more qualified to perform the true duties of an Apprentice Meat Cutter). If, as defendant contends, Bob Frentzel was to be promoted directly to Meat Manager after completing the two-year apprentice training program, then the Court would expect to find that he had been promoted in approximately June 1992. Nevertheless, as of the date of trial, which was approximately three and one-half years after he was

hired, Bob Frentzel had yet to be promoted. For reasons stated in footnote 1, the Court finds defendant's attempts to justify this failure to promote to be unpersuasive.[1]

In combination, the foregoing facts lead the Court to the inescapable conclusion that plaintiff was not hired as an Apprentice Meat Cutter for reasons other than her lack of higher education and managerial experience, that the qualifications pursuant to which defendant hired Bob Frentzel as an Apprentice Meat Cutter were purely pretextual. The fact that defendant has never hired a woman as an Apprentice Meat Cutter only serves to bring its actions and motives into sharper focus. The Court thus believes that there is a reasonable basis for inferring, as the jury did, that a motivating factor in defendant's decision not to hire plaintiff as an Apprentice Meat Cutter was her sex. As such, the Court finds that plaintiff has carried her ultimate burden of proof. *Hicks* at 2749; *Burdine* at 256, 101 S.Ct at 1095; *McDonnell Douglass* at 804, 93 S.Ct. at 1825.

54. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to retaliate against an employee who has filed a charge of employment discrimination under that act. 42 U.S.C. §2000e-3(a). The jury found, and this Court finds, that defendant did not illegally retaliate against plaintiff for filing charges with the EEOC and/or the MHRC.

---

[1] Defendant stated that Bob Frentzel was not promoted to Meat Manager after two years because grocery stores began to cut meat "on site" sometime soon after he was fired, thus directly impacting the amount of available meatcutting work. The Court, however, finds defendant's excuse to be unpersuasive, if for no other reason than a reduction in the amount of available meatcutting work occasioned by on site cutting should necessitate a commensurate reduction in force of Meat Cutters, not Meat Managers. Put another way, less meat to be cut and packed should require fewer Meat Cutters, not fewer Meat Managers. This being the case, defendant should have wanted Bob Frentzel in any position other than Meat Cutter, particularly considering the fact that he had no meat background whatsoever.

55. The jury found, and this Court finds, that, as a result of defendant's discrimination, plaintiff has suffered actual damages in the amount of $22,500.00.

Accordingly,

IT IS HEREBY ORDERED that judgement shall be entered in favor of plaintiff Kimberley Brandt on her claim of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

IT IS FURTHER ORDERED that judgement shall be entered in favor of defendant Shop 'N Save Warehouse Foods, Inc. on plaintiff Kimberley Brandt's claim of unlawful retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

IT IS FURTHER ORDERED that, on her claim of sex discrimination under the Missouri Human Rights Act, R.S.Mo. §213.010 *et seq.*_1986), judgement shall be entered in favor of plaintiff Kimberley Brandt on the jury verdict returned on October 27, 1994, in the amount of $22,500.00 in actual damages and in the amount of $35,000.00 in punitive damages.

IT IS FURTHER ORDERED that, on plaintiff Kimberley Brandt's claim of unlawful retaliation under the Missouri Human Rights Act, R.S.Mo. §213.010 *et seq.* (1986), judgement shall be entered in favor of defendant Shop 'N Save Warehouse Foods, Inc. on the jury verdict returned on October 27, 1994.

IT IS FURTHER ORDERED that, on plaintiff Kimberley Brandt's prayer for injunctive relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* and the Missouri Human Rights Act, RS.Mo. §213.010 *et seq.* (1986), defendant Shop 'N Save Warehouse Foods, Inc. do the following:

Plaintiff will be promoted to the next available position of Apprentice Meat Cutter with any of defendant's stores within the

geographic jurisdiction of UFCW Local 88 and will be permitted to complete the entire two-year apprentice training program outlined by defendant in Plaintiff's Exhibit 91. After completing the two-year apprentice training program, plaintiff will be promoted to the next available position of Journeyman Meat Cutter within the geographic jurisdiction of UFCW Local 88. In the meantime, plaintiff will be paid at the Journeyman Meat Cutter rate under the current CBA between defendant and UFCW Local 88 and given a seniority date of June 3, 1991. Plaintiff will be paid at this rate retroactively to the date of the jury verdict (October 27, 1994) until such time as she has completed the two-year apprentice training program and is promoted to the position of Journeyman Meat Cutter. Such relief is warranted under *King v. Staley*, 849 F.2d 1143 (8th Cir. 1988), and *Ingram v. Missouri Pacific R.R. Co.*, 897 F.2d 1450 (8th Cir. 1990).

IT IS FURTHER ORDERED that defendant's Motion for Judgement Notwithstanding the Verdict and Motion for New Trial be **DENIED**.

/s/ Terry I. Adelman
TERRY I. ADELMAN
UNITED STATES
MAGISTRATE JUDGE

Dated this 24th day of August, 1995.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 4:92CV1012 (TIA)

St. Louis, Missouri
October 25, 1994
9:30 a.m.

KIM BRANDT,
Plaintiff,

vs.

SHOP 'N SAVE,
Defendant.

TRANSCRIPT OF THE JURY TRIAL — VOLUME II
BEFORE THE HONORABLE TERRY I. ADELMAN
UNITED STATES MAGISTRATE JUDGE

TRANSCRIPT ORDERED BY: Robert Stewart

APPEARANCES:

For the Plaintiff: William Moench
2256 South Grand, #3
St. Louis, Missouri 63104
(314) 773-3566

For the Defendant: Robert Stewart
2730 North Ballas, #200
St. Louis, Missouri 63131
(314) 567-7350

Recorded By: Lisa Lang, Court Recorder

Transcribed By: Deborah A. Carter

Deborah A. Carter
Carter Transcription Services
10426 Castle Drive
St. Louis, MO 63136
(314) 868-2611

* * *

[225]

Q And once you've determined there's a need for a new employee, you generally look to see if they [sic] are any internal candidates for whom the job would be a normal progression, don't you?

A Yes.

Q Now Bob Frentzel was hired as an apprentice meat cutter in June of 1991, wasn't he?

A Yes.

Q And you, and Bill Fant and Danny Howard, were all involved in hiring him weren't you?

A. Yes.

Q And you were the one with the ultimate authority to either approve or disapprove the hiring of Bob Frentzel, weren't you?

A No.

Q Well did you have the authority to approve the hiring of Frentzel?

A Yes.

Q Now you and Bob Frentzel had been friends since about 1966, hadn't you?

A Yes.

Q And you'd gone to school together where you became friends, is that right?

A Yes.

Q And you knew Frentzel was looking for a job when manage- **[226]** ment determined that an apprentice meat cutter should be hired, didn't you?

A No.

Q Okay. When, in relation to the decision to hire an apprentice meat cutter, did you learn that Mr. Frentzel was looking for a job?

A It was within a week or two, as coincidence has it, timing, or whatever you want to call it, he happened to call me. I hadn't actually heard from him in a while.

Q Okay. And you obtained Mr. Frentzel's resume from him and took it to Bill Fant and suggested Fant might be interested in interviewing Mr. Frentzel, didn't you?

A Yes.

Q And you told Mr. Fant you thought that Bob Frentzel would be a good candidate for the opening, didn't you?

A Yes.

Q And Mr. Fant took your suggestion, didn't he?

A Yes.

Q Now Mr. Fant was directly underneath your supervision at the time, wasn't he?

A No.

Q Were you above him in the chain of command?

A No.

Q Who was his boss at the time?

A But Covili, or Bob Patilo (phonetic), and at that

* * *

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 95-3430 EMSL and 95-3744 EMSL

KIMBERLY BRANDT,
Appellee,

v.

SHOP 'N SAVE WAREHOUSE FOODS, INC.,
Appellant.

**APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION
THE HONORABLE TERRY I. ADELMAN, PRESIDING**

**BRIEF FOR APPELLANT
SHOP 'N SAVE WAREHOUSE FOODS, INC.**

ROBERT W. STEWART
SHELLEY M. ROITHER
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350

OF COUNSEL:

McMAHON, BERGER, HANNA,
LINIHAN, CODY & McCARTHY
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350

* * *

D. ***The Decision To Hire An Apprentice Meatcutter And The Qualifications Established.*** In October 1990, John Dougherty replaced Richard Marty as Vice President of Human Resources. In May 1991, Bill Fant[6], Meat Manager, approached Dougherty concerning the hire of an apprentice meatcutter (TR III-46-47, 216). This particular apprentice meatcutter position was not, however, to be a typical meatcutter position (TR III 46-47, 216-17). Instead, the individual selected was to be hired with the intention to groom him or her for ultimate promotion into a management position, after gaining meatcutter experience (TR III 46-48, 216-17).[7] Fant told Dougherty that he believed the right candidate would have college and management experience (TR II-46-48). **The qualifications for this particular position were set at this time after discussion between Dougherty and Fant—the ideal candidate for the apprentice meatcutter/ trainee position would possess at least some college education and prior management experience.**[8] Tom Calvin, a store level meat manager (and union member) who testified on behalf of Plaintiff, acknowledged that before Bob Frentzel (ultimately the successful candidate) ever arrived at the store as an apprentice meatcutter,

* * *

---

[6] Bill Fant was Defendant's company-wide meat manager at all times material to this lawsuit (TR III-40-41).

[7] Fant indicated the Company was weak in managers with a meat background (TR III-217). He wanted to bring an individual in, train him or her in meat the "Shop 'n Save way", ultimately grooming the individual for management (TR III-217).

[8] At the time the decision was made to search for an apprentice meatcutter and the qualifications were set, Dougherty had no knowledge that Frentzel (ultimately the successful candidate) was searching for a job (TR II-225-26).

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 95-3430 EMSL and 95-3744 EMSL

KIMBERLY BRANDT,
Appellee,

v.

SHOP 'N SAVE WAREHOUSE FOODS, INC.,
Appellant.

**APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION
THE HONORABLE TERRY I. ADELMAN, PRESIDING**

REPLY BRIEF FOR APPELLANT SHOP 'N SAVE WAREHOUSE FOODS, INC.

ROBERT W. STEWART
SHELLEY M. ROITHER
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350

OF COUNSEL:

McMAHON, BERGER, HANNA,
LINIHAN, CODY & McCARTHY
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350

* * *

Plaintiff has neither established Defendant continued to seek applicants with qualifications similar to Plaintiff's nor selected a male with similar qualifications.

B. Plaintiff's Reliance Upon "Preselection" Cases Is In Error.

Plaintiff asserts she has established a *prima facie* case of discrimination by adducing evidence she contends shows Defendant "adjusted the qualifications it required to fit the man that it wanted for the job." Plaintiff's Brief, at 16. In essence, Plaintiff asserts she has created a proper inference of sex discrimination by adducing evidence she contends shows the qualifications were not true, but tailored to meet the qualifications of the person allegedly preselected for the job.[6]

Plaintiff misses the mark entirely by relying upon these cases inasmuch as there is no dispute in the record evidence that the qualifications for this unique apprentice meatcutter position were established and set *prior to* Frentzel entering the picture!! Indeed, it is undisputed that at the time the decision was made to search for an apprentice meatcutter and the qualifications were set, Dougherty had no knowledge that Frentzel was even searching for a job (TR ll-225-26). Plaintiff cannot assert that Defendant "preselected" Frentzel and then set the qualifications for this argument absolutely belies the record evidence.

Therefore, Plaintiff's reliance upon *Greer v. Univ. Of Arkansas Bd. of Trustees*, 544 F. Supp. 1085 (D. Ark. 1982), *Coble v. Hot Springs School Dist. No. 6*, 682 F.2d 721 (8th Cir. 1982), and *Roberts v. Gadsden Memorial Hospital*, 835 F.2d

* * *

[6] Defendant posits Plaintiff, by asserting this argument, is really contending the qualifications were pretextual. This issue is addressed in Defendant's Brief, at 22-23. For purposes of this reply, Defendant will address the theory as advanced by Plaintiff.

Supreme Court, U.S.
FILED
SEP 12 1997
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(2)

No. 97-365

In The

Supreme Court of the United States

October Term, 1996

KIMBERLY BRANDT,

Petitioner,

vs.

SHOP 'n SAVE WAREHOUSE FOODS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHELLE M. CAIN
Counsel of Record
ROBERT W. STEWART
SHELLEY M. ROITHER
McMAHON, BERGER, HANNA
LINIHAN, CODY & McCARTHY
Attorneys for Respondent
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350

71887
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

44 pp

QUESTIONS PRESENTED FOR REVIEW

Whether a conflict exists between the circuits on the following questions, and if so, whether such conflict pertains to an important matter:

A. Whether Judgment as a Matter of Law for an employer, can never be appropriate in a discrimination case, where at least one (1) of the employer's legitimate, non-discriminatory reasons is rejected as untrue?

B. Whether a Plaintiff is estopped to complain that a Court found the absence of intentional discrimination where it did so through express reliance upon Plaintiff's argument that the successful candidate was the beneficiary of preselection.

RULE 29.6 STATEMENT

Respondent is a wholly owned subsidiary of Fox-Wetterau, Inc. — which is a wholly owned subsidiary of SuperValu Holdings, Inc. — which is a wholly owned subsidiary of Supermarket Operations of America, Inc. — which is a wholly owned subsidiary of SuperValu, Inc.

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STATEMENT OF THE CASE

Facts

A. ***Introduction.*** Shop 'n Save operates a number of grocery stores in Illinois and Missouri. Brandt, a member of UFCW Local 88, worked out of the Union's hiring hall as a meat clerk or meatwrapper on a temporary basis for a variety of stores, including Shop 'n Save, from approximately 1987 to July 1991 (TR[1] II-5-9). In August 1990, while Brandt was working out of the hiring hall, she wrote Richard Marty, Shop 'n Save's then-acting V.P. of Human Resources,[2] and Harold "Butch" Covili, Senior V.P. of Operations,[3] indicating her interest in being hired as an employee of Shop 'n Save in several positions, including management and Apprentice Meatcutter (TR III-31-32; DX-C).

B. ***The Courtesy Interview.*** Marty provided Brandt the opportunity of a courtesy interview on September 7, 1990 (TR III

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1. References to "TR __-__" are to the volume and page number of the transcript of the trial proceedings before the United States District Court for the Eastern District of Missouri, the Honorable Terry I. Adelman presiding. References to "App. __" are to the Appellant's Appendix, prepared pursuant to Rule 30 of the Federal Rules of Appellate Procedure and filed with the Eighth Circuit. References to "PX __" and "DX __", respectively, are to Plaintiff's and Defendant's exhibits at trial and at issue herein and are included in the Appendix filed with the Eight Circuit.

2. Richard Marty acted as Senior V.P. of Human Resources from May 1990 until he hired John Dougherty to replace the V.P. of Personnel, Nancy Moss, who had resigned (TR II-217; III-24-26). John Dougherty was V.P. of Human Resources and/or functioned in a similar position from the time of his hire on or about October 10, 1990 through trial (TR II-224; III-214).

3. Harold "Butch" Covili was Senior V.P. of Operations for approximately two (2) years prior to June 1991. In May or June 1991, Covili went to work for corporate Wetterau "on loan" for approximately ten (10) months, traveling to Florida and New Jersey to assist in the management of corporate stores in those locations (TR II-215-16; TR III-17-18).

34-35). At trial Brandt acknowledged the interview was merely "a courtesy" and knew she was not seriously being considered for management because, as she testified, she lacked college (TR II-113-14). Brandt has conceded this point to this Court (Petition at 3). By letter dated September 17, 1990, Marty advised Brandt that Shop 'n Save would not offer her employment, but that her application would be placed in the "active files" for one year (TR III-35-36; PX 31).

C. *"Active Files".* Shop 'n Save's "active files" refer to those files wherein applications and resumes are retained for the one year period required by law (TR III-29-30, 36, 221). As explained by Dougherty, it is not a normal practice of Shop 'n Save to review documents in its "active files" in order to search for candidates for job openings (TR III-221-22). Neither John Dougherty nor Richard Marty *ever* looked through the "active files" for purposes of searching for candidates to fill positions for Shop 'n Save (TR III-30-31, 222). Despite Plaintiff's allegation that Marty testified that "active files" might help the Company fill an employment need (Petition at 3), Marty testified to the opposite, stating that Shop 'n Save had never looked through "active files" to find candidates (TR III-30-31, 222).

D. *The Decision To Hire An Apprentice Meatcutter And The Qualifications Established.* In October 1990, John Dougherty replaced Marty as V.P. of Human Resources. In May 1991, Bill Fant[4], Meat Manager, approached Dougherty concerning the hire of an Apprentice Meatcutter (TR III-46-47, 216). This particular Apprentice Meatcutter position was not, however, to be a typical meatcutter position (TR III 46-47, 216-17). Instead, the individual selected was to be hired to be groomed for ultimate promotion into a management position, after gaining meatcutter experience (TR III 46-48, 216-17).[5] Fant told Dougherty that he believed the right

4. Bill Fant was Shop 'n Save's company-wide meat manager (TR III-40-41).

5. Fant indicated the Company was weak in managers with a meat (Cont'd)

candidate would have college and management experience (TR II-46-48). The qualifications for this particular position were set at this time after discussion between Dougherty and Fant — the ideal candidate for the Apprentice Meatcutter/trainee position would possess some college education and prior management experience.[6] Tom Calvin, a store level meat manager (and union member) who testified on behalf of Plaintiff, acknowledged that before Bob Frentzel (ultimately the successful candidate) ever arrived at the store as an Apprentice Meatcutter, and before Plaintiff ever surfaced as a legal issue, Calvin had a discussion with Fant, Howard and Dougherty, and he was advised the Apprentice Meatcutter was going to be groomed for a management position and, as a result, had some college background (TR II-186-87).

E. ***College And Managerial/Supervisory Experience.*** The evidence was undisputed that, under Dougherty's direction, Shop 'n Save has consistently required college education and managerial/supervisory experience among its management group, including store managers (TR III-225-27). Excluding pharmacists, twenty-eight (28) salaried employees were hired on or after October 29, 1990 (date of Dougherty's hire) (TR III-225; DX LL). Twenty-two (22) of the twenty-eight (28) salaried employees of Shop 'n Save hired after Dougherty (excluding pharmacists) have college and/or managerial/supervisory experience (TR III-226-27).

F. ***Shop 'n Save Contacts The Union.*** Pursuant to the terms of the then controlling bargaining agreement, before Shop 'n Save could hire an Apprentice Meatcutter, Union consent was required

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(Cont'd)
background (TR III-217). He wanted to bring an individual in, train him or her in meat the "Shop 'n Save way", ultimately grooming the individual for management (TR III-217).

6. At the time the decision was made to search for an Apprentice Meatcutter and the qualifications were set, Dougherty had no knowledge that Frentzel (ultimately the successful candidate) was searching for a job (TR II-225-26).

(TR II-52-53). Accordingly, Dougherty contacted Ed O'Reilly, President of Local 88, and informed him of the desire to hire an Apprentice Meatcutter (TR III-154, 220). Dougherty advised O'Reilly that the intention was to hire an Apprentice Meatcutter who would eventually be promoted to a management position (TR III-155). O'Reilly agreed to the hiring of an Apprentice Meatcutter on these terms (TR III-155).

G. ***Bob Frentzel.*** After the decision had been made to hire an Apprentice Meatcutter, and after the qualifications for the position had been set, Dougherty received a telephone call from an old acquaintance, Bob Frentzel, who was out of a job and looking for work (TR III-217-18). Frentzel called Dougherty with the intention to "network" in an effort to find employment (TR III-168-69). Dougherty advised Frentzel of the Apprentice Meatcutter position and upon receipt of his resume, provided it to Fant (TR III-219). Fant, after reviewing the resume, arranged for an interview of Frentzel (TR III-50, 219). Frentzel was the only candidate interviewed for the position (TR III-50, 230) — and Shop 'n Save took no steps to fill this position other than to interview Frentzel.

Frentzel was interviewed by Fant and Howard (TR III-50, 183, 197).[7] At the interview, Fant and Howard explained they were looking for more than just a meatcutter — they were looking to fill a management position ultimately with an individual with meat experience as derived from an apprentice program (TR III-50, 183). Despite Brandt's contentions to the contrary before this Court (Petition at 4), Frentzel's management and college backgrounds, together with their importance, were noted during his interview. Fant and Howard were impressed with Frentzel, who had nineteen (19) years of management experience[8] and four (4) years of college,

7. Danny Howard was a meat specialist and assistant to Bill Fant at all material times.

8. The determining factor in the decision to hire Frentzel was his management background (TR III-52). Frentzel had worked as a department (Cont'd)

thereby meeting the qualifications previously set for this position (TR III-51-52, 200). After the interview, Dougherty, Fant and Howard decided to hire Frentzel as an Apprentice Meatcutter, effective June 3, 1991 (TR III-220). Frentzel was the first and last Apprentice Meatcutter ever hired by Shop 'n Save within the jurisdiction of UFCW Local 88 (TR III-155-56).

H. ***The Decision Makers' Lack Of Knowledge Of Plaintiff's Interest.*** Neither Dougherty, Fant nor Howard knew of Plaintiff's interest in a meatcutter position which she conveyed to Butch Covili and Dick Marty in August 1990 (TR III-45, 197, 200, 222). This information had not been communicated to any of the three decision-makers who hired Frentzel for the Apprentice Meatcutter position. In June 1991, Covili was in Florida on loan to corporate Wetterau[9], and Marty had already departed the Company. Indeed, at no time did Marty ever mention or discuss this interview or correspondence with Dougherty, Fant or Howard (TR III-36-37, 45, 197, 200, 222). This evidence was undisputed. Neither Dougherty, Fant nor Howard had any knowledge of this occurrence or that Plaintiff had expressed an interest in an Apprentice Meatcutter position. In addition, Dougherty did not search the "active files" in order to seek out potential applicants for this position.

While Plaintiff argues that Danny Howard knew of her desire to become a female Apprentice Meatcutter (Petition at 2, 6), as with respect to other contentions made by Brandt, this contention

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(Cont'd)
foreman, supervising three (3) to fifteen (15) employees represented by the United Steel Workers, as a Corporate Vice-President of Purchasing, maintaining responsibility over three (3) plants and a budget of sixteen (16) to eighteen (18) million dollars, and as a plant manager, supervising fifty (50) union production workers (TR III-173-78; PX 47).

9. Thus, despite Brandt's contention (Petition at 5), Covili's "knowledge" is of no importance since he shared it with no one and was not a decisionmaker in this matter.

is not supported by the record. Between 1987 and 1991, Plaintiff had numerous conversations with Howard about opportunities with Shop 'n Save — she worked there as a casual wrapper and was interested in being hired by Shop 'n Save as an employee (regular meatwrapper) (TR II-22, 102). Plaintiff, however, testified that she had *only one* conversation with Howard about the subject of Apprentice Meatcutter and this occurred in late 1989 or early 1990 (TR II -104-105). The substance of the conversation did *not* concern becoming an Apprentice Meatcutter — but rather, concerned whether Shop 'n Save might someday institute an apprentice program (TR II-104-05). Plaintiff adduced no evidence to impeach/ contradict the decisionmakers' testimony that they were unaware of her interest in this position.

Assuming *arguendo*, that Plaintiff's one conversation with Howard is at issue, such is not "substantial evidence upon which a reasonable jury" might have relied: According to Plaintiff, this conversation occurred 15 to 21 months prior to Frentzel's hire; in the normal realm of human affairs, this one conversation would not have "stuck out" in view of Plaintiff's four year crusade and numerous conversations with Howard to be hired as a regular meatwrapper; moreover, in view of the hundreds of people with whom Howard converses in a week (TR III-198), there is nothing about this remote and isolated conversation which would be expected to "stick with him" many months later.

I. *Brandt Becomes A Legal Issue.* Upon learning of the hire of Frentzel, on June 3, 1991, Plaintiff visited Dougherty and advised him of her previous visit with Marty (TR II-68; III-228-30). Plaintiff walked into his office and announced, "In case you didn't notice, I'm a female" (TR III-229). Plaintiff complained about not being considered for the position filled by Frentzel and told Dougherty she had applied (TR III-229). At this time, Dougherty had the appropriate files searched, but her application could not be located (TR II-68, 118; III-229-30). Dougherty explained he had no knowledge of her application or of her previous discussion with Marty (TR II-117-19). He further advised Plaintiff, however, that

they were looking to groom someone for management (TR II-119) and, as a result, even had she been considered, she lacked the qualifications necessary for the particular position since Plaintiff had no college education and no management experience. Plaintiff acknowledged this is what she was told when she confronted Dougherty for the first time about the hire of Frentzel (TR II-68). There is no dispute but that Plaintiff lacked college and managerial experience (TR II-95,120).

J. ***Hindsight: Frentzel's Lack Of Progress Up The Management Chain.*** Brandt attempts to make an issue (Petition at 5) out of the fact that at the time of trial, Frentzel had completed the Apprentice Meatcutter program, but had not yet become a manager of any type (TR 185-86; 260). Since June 1991, however, Fant explained the vast changes directly affecting the meat industry. Meat is no longer primarily being cut on site at grocery stores, but is being cut at the packing plants and sent to the grocery stores pre-packaged and vacuum-packed, thereby directly impacting the amount of work available in the meatcutting industry (TR III-58). As a result, the Company experienced a cut back in management staff in the meat area since the hire of Frentzel (TR III-58). Among other changes, when the ownership of Shop 'n Save changed, restructuring occurred, which involved, among other things, the demotions of two (2) meat specialists to store level meat managers (TR III-58-59). In fact, since the hire of Frentzel, only two (2) store level meat manager positions have been filled (TR III-61). Joe Sarillo was selected for the management position over Frentzel because he had thirty (30) years of experience in the meat industry and had been relieving the head meatcutter at the Ellisville store (TR III-61). Tim Clancy was selected over Frentzel because of the time he had spent at the largest store of Shop 'n Save and had also relieved the head meatcutter there (TR III-61).

K. ***The Meatcutter And Meatwrapper Job Classifications.*** Historically, the positions of meatcutter and meatwrapper (now known as "meat clerk") were different. The occupants of these positions performed different duties. While Brandt argues that, as

a meatwrapper/meat clerk, she performed the duties of a meatcutter (and hence, by inference, was "qualified" to be hired as an Apprentice Meatcutter), the truth of the matter is that the duties and responsibilities of meatwrappers/meat clerks did not begin to resemble the duties of a meatcutter until the time of the September, 1993 change in the collective bargaining agreement (TR II-38-39). Thus, in June of 1991, Plaintiff's skills and abilities did not come even remotely close to resembling the skills and abilities of a meatcutter.

As indicated by Brandt, her UFCW Local 88 reflected a membership of between 600 and 650 meatcutters (Petition at 2). Inasmuch as there were only three (3) or four (4) female meatcutters within the jurisdiction — and Shop 'n Save employed one (1) of these females — Brandt can hardly complain about alleged "sex segregated" job classifications (Petition at 2).

L. ***Preselection And Pretext.*** Before the Eighth Circuit (Brief for Appellant at 25) Shop 'n Save articulated its legitimate, nondiscriminatory rationale as follows:

> Defendant was . . . entitled to Judgment as a Matter of Law because it demonstrated two legitimate, nondiscriminatory reasons for the denial of promotion which Plaintiff failed to prove were pretextual: the decisionmakers did not know she had applied and, even had they known, she did not meet the established qualifications.

Throughout this case, Brandt has argued that this case was a "preselection case", *i.e.* that Defendant decided to hire Bob Frentzel and then crafted job qualifications that he could satisfy. For example, in closing argument, Brandt argued this theme of preselection (TR IV-63; Respondent's Appendix A, pp. 1a-3a). In Brandt's Brief to the Eighth Circuit, Brandt again argued that Frentzel was preselected for the job and that the qualifications were thereafter

tailored with his resume in mind (Brandt's Brief at 16; Respondent's Appendix B, p. 4a). Brandt has argued this same point of "preselection" to this Court (Petition at 18).

The Eighth Circuit agreed with Brandt's theory of the case, and now **she is unhappy with her success**! The Eighth Circuit held as follows (Petitioner's Appendix at A-7 and 8):

> We have carefully reviewed the record in this case, and we are confident that the jury might easily have found that Shop 'n Save — Dougherty specifically, with Fant's assistance — created the Apprentice Meatcutter position and its qualifications with the express purpose of hiring Frentzel to fill it, that is, that Shop 'n Save's proffered "legitimate reason" was a fabrication, a pretext for its true reasons. We are so persuaded ourselves.
>
> . . . It is apparent that the position was created for Frentzel, with the job's "qualifications" tailored to Frentzel's background, rather than that Frentzel coincidentally and fortuitously happened into a just-created position that required his "qualifications."

Thus, on this state of record, Shop 'n Save is forced to concede *arguendo*, that the facts outlined above in Sections D and G must be inverted for purposes of analysis. In other words, as to which came first — Frentzel — or the Apprentice Meatcutter position — the Eighth Circuit has spoken (pursuant to Brandt's lead) and, for these purposes Frentzel came first — and the Apprentice Meatcutter position was thereafter created. While this conclusion does not square with the truth or with the record created in this case, for purposes of analysis, it is the law of this case.

While the Eighth Circuit viewed as pretextual Shop 'n Save's explanation that Plaintiff was not qualified for the Apprentice Meatcutter position (on the theory that Frentzel was preselected for the job) it is noteworthy that there has never been any finding that the second prong of Shop 'n Save's explanation was anything but accurate, *i.e.* that the decisionmakers did not know that Brandt had applied for the position.

The Proceedings Below

Brandt filed her EEOC/MCHR Charge on June 17, 1991, contending that she had been denied the position of Apprentice Meatcutter because of her sex. (PX-14). On February 29, 1992, the EEOC determined that Brandt had not been denied the Apprentice Meatcutter position because of her sex (DX-R).

Plaintiff Kim Brandt filed her Complaint (App. 9-13) on May 28, 1992, alleging her employer, Shop 'n Save, had discriminated against her on the basis of her sex in denying her a promotion to Apprentice Meatcutter in June 1991, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, and the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.111. Plaintiff also alleged she was denied full-time work opportunities in retaliation for filing a Charge with the Equal Employment Opportunity Commission ("EEOC"), also in violation of Title VII and the MHRA.

The matter was tried in October of 1994, with the trial on the amount of punitive damages bifurcated.[10] At the conclusion of Plaintiff's evidence, and at the conclusion of all evidence (App.

10. The trial court reserved a pre-trial ruling on the Motion to Bifurcate. Yet, Plaintiff closed her case in chief without adducing (or attempting to adduce) any evidence as to Defendant's net worth for assessment of punitive damages. At the jury instruction conference, the court addressed this error of Plaintiff by "granting" Defendant's Motion to Bifurcate, thereby permitting Plaintiff to introduce such evidence during the second phase of the trial, should the jury make a finding of malice based upon the initial phase of trial.

115-18; TR III-30-37), Motions for Judgment as a Matter of Law were denied (TR III-137, TR IV-13-14). The jury returned a verdict for the Plaintiff on her claim of denial of promotion to the position of Apprentice Meatcutter and awarded her $22,330.93 for lost wages and benefits (App. 202-03). With respect to Plaintiff's claim for punitive damages, the jury found Defendant's conduct was outrageous, and despite the bifurcation as to the amount of punitive damages, the jury jumped the gun and hand-wrote at the bottom of the verdict form the following:

> PUNITIVE DAMAGES: $35,000.00 PLUS DEFENDANT PAYS ALL THE PLAINTIFF'S LEGAL FEES.

The jury found in favor of Defendant on Plaintiff's claim of retaliation (App. 204-05).

On August 14, 1995, United States Magistrate Terry I. Adelman entered Judgment for Plaintiff on her claim of promotion denial — and in favor of Defendant on the retaliation claim (at 142-55). In entering Judgment for Plaintiff on her promotion denial claim, Judge Adelman relied heavily on the proposed Findings of Fact and Conclusions of Law submitted by Brandt — and, in any event, whatever his true beliefs, he was bound to draft his Findings of Fact and Conclusions of Law in the light most favorable to Plaintiff. *Garza v. City of Omaha*, 814 F.2d 553, 43 FEP 572 (8th Cir. 1987); and *Ways v. City of Lincoln*, 871 F.2d 750, 49 FEP 865 (8th Cir. 1989).

Shop 'n Save's appeal presented a number of meritorious issues — some of which required entry of Judgment for Shop 'n Save — and others of which required a new trial (Respondent's Appendix C, pp. 5a-7a). For instance, Shop 'n Save argued that it was entitled to Judgment as a Matter of Law in view of Plaintiff's failure to submit a *prima facie* case of sex discrimination. Despite Brandt's misrepresentation to this Court, the Eighth Circuit majority did not "concede" that Brandt established a *prima facie* case of sex

discrimination (Petition, at 6). Instead, in view of Shop 'n Save's entitlement to Judgment as a Matter of Law, the Eighth Circuit merely assumed, *arguendo*, the existence of a *prima facie* case (Petitioner's Appendix, A-6):

> Because we conclude as a matter of law that Brandt did not prove her gender was a motivating factor in Shop 'n Save's decision to hire Frentzel instead of her, we do not consider the changed aspects of the *prima facie* case. We assume for purposes of this appeal that Brandt proved a *prima facie* case of sex discrimination by a preponderance of the evidence.

The court also found it unnecessary to address Shop 'n Save's other points on appeal (Petitioner's Appendix, A-9):

> Shop 'n Save raises a number of other issues in its appeal. Because of our disposition of the first issue, it is unnecessary for us to consider those that remain.

The Eighth Circuit reversed, and entered Judgment for Shop 'n Save, reasoning as follows (Petitioner's Appendix, A-7, 8 and 9):

> . . . . We do not believe that Brandt has met her burden of proving that the pretext was intended to conceal unlawful discrimination or that her gender in any way motivated the hiring of Frentzel instead of Brandt. The "fact sensitive" issue at this stage of the analysis is "whether the employee has provided evidence from which a reasonable factfinder could conclude that the Employer intentionally discriminated against the

> employee for a prohibited reason." [citation omitted]. We hold that she has not.
>
> . . . . No reasonable jury could have found that Frentzel was hired to the exclusion of Brandt because Brandt is female [citation omitted]. Shop 'n Save thus is entitled to Judgment as a Matter of Law.
>
> This is a case "where the evidence of pretext is inconsistent with an inference of intentional discrimination". . . Of course, Brandt was free to "rely on the same evidence to prove both pretext and discrimination", but that does not prevent our reversal of the denial of Shop 'n Save's Motion for JAML where "the evidence is insufficient for a reasonable finder of fact to infer unlawful discrimination."

Brandt sought Rehearing and Rehearing *En Banc*. Rehearing *En Banc* was denied by a vote of 8 to 3, with Rehearing denied by Judge Bowman (the author of the underlying Opinion), Judge Wollman (who joined Judge Bowman in the primary Opinion) as well as by Judges Fagg, Magill, Beam, Loken, Murphy and Morris S. Arnold.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT BETWEEN THE CIRCUITS ON THE ISSUE OF WHETHER JUDGMENT AS A MATTER OF LAW FOR AN EMPLOYER CAN NEVER BE APPROPRIATE IN A DISCRIMINATION CASE WHERE AT LEAST ONE OF THE EMPLOYER'S LEGITIMATE, NONDISCRIMINATORY REASONS IS REJECTED AS UNTRUE.

Brandt contends that *certiorari* should be granted because of a conflict between the Circuits as to the true meaning and application of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 62 FEP 96 (1993). Stripped of excess verbiage, Brandt contends *Hicks* stands for two (2) related propositions in the factual scenario where Plaintiff has adduced *prima facie* case evidence, plus evidence of untruthfulness of the Employer's articulated rationale: **first**, that JAML for an Employer can **never** be appropriate; and **second**, that the FRCP 50(a)(1) duty to ascertain whether a "reasonable jury" could have found for Plaintiff, has been, *sub silentio*, repealed. Brandt contends the Circuits are split on this supposed application of *Hicks*. Moreover, Brandt contends that the Eighth Circuit's Opinion in this case "is uncomplicated and presents the problem in a clear, straightforward manner." (Petition at 9). Upon analysis, no split in the Circuits exists — FRCP 50(a)(1) has not been repealed — and assuming, falsely, but *arguendo*, that a split exists, this case does not present the split in a clear, straightforward manner, but rather, in a peculiarly factual manner.

A. The Hicks Rationale

In *Hicks*, this Court spelled out the possibilities for a Title VII Plaintiff who had presented a *prima facie* case *and* who had demonstrated the employer's legitimate, nondiscriminatory rationale to be untrue. The Eighth Circuit, below, had opined that such proof compelled Judgment as a Matter of Law for Plaintiff.

This Court reversed, providing guidance for parties placed in this same procedural posture of *prima facie* case, with untruthful rationale.

The linchpin of *Hicks*, quoted twice, (509 U.S. at 507 and 518, 62 FEP at 99 and 103) was derived from *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP 113, 115 (1981) as follows:

> The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

This Court, therefore, squarely held that a *prima facie* case, with pretext, was *not* sufficient to require Judgment as a Matter of Law for Plaintiff since:

> It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination. [emphasis original]

Hicks, *supra* at 509 U.S. 519, 62 FEP at 104. Holding that Judgment as a Matter of Law is **never required** for a Plaintiff in the presence of mere *prima facie* case, with pretext, this Court defined legally required pretext:

> . . . A reason cannot be proved to be a "pretext *for discrimination*" unless it is shown *both* that the reason was false, *and* that discrimination was the real reason. [emphasis original]

Hicks, *supra*, 509 U.S. at 515, 62 FEP at 102. With this definitional background, this Court specified the two (2) procedural possibilities for a Plaintiff, who has submitted a

prima facie case and who has adduced evidence of untruthfulness of the employer's articulated rationale: The **first** procedural possibility is that the case is sent to the jury which is *permitted* to infer (or not) intentional discrimination:

> The factfinders' disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. . . .

Hicks, supra, 509 U.S. at 511, 62 FEP at 100. The **second** possibility is that (as in the *Hicks* proceedings in the District Court) Judgment will be entered for the Defendant in view of the absence of a finding of intentional discrimination:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review — which should be conducted on remand in this case under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). . . .

Hicks, supra, 509 U.S. at 524, 62 FEP at 106.[11]

Hicks thus sets forth the following paradigm where a Title VII

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11. In bench tried cases, like Hicks, the finding (or not) of discrimination is subject to the "clearly erroneous" standard of review. FRCP 52(a). In jury tried cases, the "reasonable jury" standard is utilized. FRCP 50(a)(1).

Plaintiff has submitted a *prima facie* case, with evidence that the Defendant's legitimate, nondiscriminatory rationale is untrue: The factfinder is **permitted**, but not required, to find for the Plaintiff; if the factfinder rules for the Plaintiff, then Judgment as a Matter of Law (either in the District Court or in the Court of Appeals) is appropriate for Defendant where no reasonable jury, FRCP 50(a)(1), could conclude Defendant intentionally discriminated against the Plaintiff.

While Brandt contends that there is a split in the Circuits as to the "true meaning" of *Hicks*, a review of the caselaw cited by Brandt actually demonstrates that the Courts have followed the foregoing analysis, sometimes resulting in victories for Plaintiffs on appeal — and sometimes resulting in victories for Defendants on appeal — all due to the facts of the cases. FRCP 50(a)(1) is still in the Rules of Civil Procedure!!

B. Brandt Applies Hicks

In this case, since it was a jury case, rather than a *Hicks* bench case, the Eighth Circuit applied the "reasonable jury" standard, rather than the "clearly erroneous" standard of review. Quoting *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1334, 71 FEP 1458, 1461 (8th Cir. 1996), in follow-up on the *Hicks* mandate of appellate review, the *Brandt* panel posed the issue as follows:

> The "fact sensitive" issue at this stage of the analysis is "whether the employee has provided evidence from which a reasonable factfinder could conclude that the employer intentionally discriminated against the employee for a prohibited reason" . . . . We hold that she has not.

Brandt v. Shop 'n Save Warehouse Foods, Inc., 108 F.3d 935, 938, 73 FEP 652, 655 (8th Cir. 1997) (Petitioner's Appendix A-7).

The *Brandt* court reached this result by following Brandt's lead that the preferred candidate (Frentzel) had been "preselected" due to his friendship with Dougherty — and hence Shop 'n Save's argument that Brandt was not qualified for the job was pretextual since the qualifications were constructed with Frentzel specifically in mind:

> The evidence shows that Frentzel took advantage of his "network" to land the Apprentice Meatcutter position, and that Dougherty obliged his friend by supporting his application for the position, if not creating a tailor made position for Frentzel. We do not condone the exclusion of Brandt as a viable candidate on this basis. But it is not intentional sex discrimination for Dougherty to hire an unemployed old friend who happens to be male, without considering an applicant who is neither unemployed nor an old friend and happens to be female . . . No reasonable jury could have found that Frentzel was hired to the exclusion of Brandt because Brandt is female.

Brandt, *supra*, at 108 F.3d 938, 73 FEP at 655 (Petitioner's Appendix at A-7 and 8). Following up on *Ryther v. KARE 11*, 108 F.3d 832, 73 FEP 373 (8th Cir. Banc), *cert. denied*, __ S. Ct. __, 1997 WL 181004, 65 USLW 3694 (1997), *Brandt* then concludes by holding as follows:

> This is a case "where the evidence of pretext is inconsistent with an inference of intentional discrimination" [citing *Ryther*] of course, Brandt was free to "rely on the same evidence to prove both pretext and discrimination," but that does not prevent our reversal of the denial of Shop 'n Save's

> Motion for JAML where "the evidence is insufficient for a reasonable trier of fact to infer unlawful discrimination." [quoting *Ryther*].

Brandt, 108 F.3d at 939, 73 FEP at 655-56 (Petitioner's Appendix at A-9).

Thus, the case at bar does nothing more than apply traditional standards of "appellate review", as mandated by *Hicks*. In the case at bar, Plaintiff's argument of preselection negated any possible inference of intentional sex discrimination and the Eighth Circuit merely held that no reasonable jury could have concluded otherwise.

C. No Split In The Circuits

The caselaw cited by Plaintiff, does not demonstrate a split between the Circuits in interpreting the "true meaning" of *Hicks*. Instead, the cases[12] are easily analyzed and harmonized in four (4) categories:

1. The Absence Of A Prima Facie Case And/Or Evidence Of Pretext.

Several of the cases cited by Brandt, allegedly demonstrative of a split in the circuits, are actually cases where Plaintiff failed to submit a *prima facie* case and/or evidence of pretext for intentional discrimination. *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1318, 63 FEP Cases 816, 821 (4th Cir. 1993), for example, held as follows:

> Because Mitchell failed to establish a *prima facie* case and failed to carry the ultimate

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12. *Gilligan v. Martin*, 81 F.3d 835, 70 FEP 856 (9th Cir. 1996) has nothing to do with the issues herein discussed, but rather concerns the issue of whether an Affirmative Action Plan can serve as a defense in a reverse discrimination case.

> burden of persuasion in the face of the employer's nondiscriminatory explanation by establishing a genuine issue of material fact in connection with the explanation, we affirm the Summary Judgment entered by the District Court in favor of Data General.

In *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084, 65 FEP Cases 585, 589 (6th Cir. 1994) Plaintiff failed to adduce any evidence of the untruthfulness of the Defendant's articulated rationale for his termination:

> In the present case, Manzer contends that the same evidence which created a jury question on his *prima facie* element of "qualification" was also sufficient to permit a reasonable juror to reject Diamond Shamrock's proffered explanations as "phony". The District Court held, and Manzer does not dispute, that he presented no evidence that his employer's explanations were "factually false".

Woods v. Friction Materials, Inc., 30 F.3d 255, 262, 65 FEP Cases 1109, 1114 (1st Cir. 1994) is another case where Plaintiff failed to present evidence of pretext:

> Because Woods has failed to present sufficient evidence to permit a reasonable factfinder to infer that FMI's articulated reason was a pretext for unlawful age discrimination, his claim under ADEA must fail.

Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 72 FEP Cases 1635 (7th Cir. 1997) simply affirms Summary Judgment for the Defendant on the basis that Plaintiff failed to submit a

prima facie case. *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 72 FEP 1603 (6th Cir. 1997) is just the converse: the District Court's entry of Judgment for the Employer for lack of a *prima facie* case was reversed since the Sixth Circuit was convinced of the existence of a *prima facie* case.

2. The FRCP 50(a)(1) "Reasonable Jury"

Disregarding the cases discussed above at (1.) (which have no bearing upon the issue at hand) most of the cases cited by Plaintiff involve an application of FRCP 50(a)(1) and its "reasonable jury" standard of review. *Hicks* made it clear that the factfinder's findings in a discrimination cases (like any other case), are subject to "appellate review" — since Brandt was a jury tried case, the "reasonable jury" standard was utilized. FRCP 50(a)(1).[13] Thus, where Plaintiff has submitted a *prima facie* case and has demonstrated that the employer's articulated rationale was not truthful, the appellate court must conduct a "fact intensive . . . case by case" review to determine whether a reasonable factfinder might properly have inferred intentional discrimination. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d at 1335, 71 FEP at 1462; *see* also *Ryther*, 108 F.3d at 838, 73 FEP at 376; and *Brandt*, 108 F.3d at 938, 73 FEP at 655 (Petitioner's Appendix at A-7).

The bulk of the caselaw cited by Brandt, categorized as "pretext only" cases and/or "pretext plus" cases are really nothing more than cases subjecting the evidence to a "fact intensive . . . case by case" review, focused upon the question of whether, based upon the evidence, a reasonable jury might have found intentional discrimination.

For example, *Fisher v. Vassar College*, 114 F.3d 1332, 1334-

13. In other words, an Appellate Court must enter JAML for a Defendant, denied by the District Court, where no "reasonable jury" could have entered Judgment for Plaintiff. *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1098-99 (3d Cir.), *cert. denied*, 450 U.S. 981 (1980); *Resolution Trust Corp. v. Cramer*, 6 F.3d 1102 (5th Cir. 1993).

35, 1338, 74 FEP 109, 112, 115 (2nd Cir. Banc 1997) was bench tried (rather than jury tried), but, with this FRCP 50(a)(1)/FRCP 52(a) standard of review distinction, is nevertheless illustrative. Therein, a *prima facie* case, as well as evidence of untruthfulness was submitted; the District Judge entered Judgment for Plaintiff. The Second Circuit, sitting *en banc*, after an intensive review of the record, found insufficient evidence of intentional discrimination, and entered Judgment for the Defendant:

> [Judgment for Plaintiff] . . . may be reversed — even if there is a sustainable finding of pretext — if the evidence, considered in the aggregate, will not support a finding by the District Court that the reason for the adverse employment action was intentional discrimination . . .
>
> * * *
>
> The sufficiency of the finding of pretext to support a finding of discrimination depends on the circumstances of the case. This is an unremarkable principle: the sufficiency of any evidentiary finding depends on the other findings and evidence that accompany it.

Walker v. NationsBank of Florida, 53 F.3d 1548, 1558, 68 FEP 314, 321 (11th Cir. 1995) involved a Plaintiff who had submitted a *prima facie* case, as well as evidence which bore upon the truthfulness of the articulated rationale, yet, nevertheless, saw JAML entered for the Defendant at the close of Plaintiff's case. After a careful review of the facts, the Eleventh Circuit believed that "bad blood", rather than age or sex, motivated the termination and held as follows:

> Reasonable and fair minded persons, in the exercise of impartial judgment, would not

> conclude that the bank had discriminated against Walker on either the basis of her age or sex. We therefore affirm the District Court's entry of a directed verdict in favor of the bank.

In other cases, Courts of Appeal have concluded that a "reasonable jury" could have found intentional discrimination. *See EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 66 FEP 1102 (2nd Cir. 1994) (against the background of *prima facie* case and evidence of untruthfulness of rationale, sufficient evidence existed for a reasonable jury to reach a conclusion of intentional discrimination); *Barbour v. Merrill*, 48 F.3d 1270, 1277, 67 FEP 369, 373 (D.C. Cir. 1995) ("the jury could have reasonably concluded that *Barbour* had proven unlawful discrimination"); and *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 995, 69 FEP 1720, 1723 (5th Cir. Banc 1996), n.6, ("the evidence . . . [was] sufficient for a reasonable factfinder to infer that the employer's decision was motivated by a discriminatory animus").

One of the cases primarily relied upon by Brandt, actually harmonizes the existing caselaw. *Sheridan v. E.I. DuPont DeNemours & Co.*, 100 F.3d 1061, 1068, 72 FEP 518, 524 (3d Cir. Banc 1996), n.7, *cert. denied*, __ S. Ct. __, 1997 WL 49784, 65 USLW 3571 (U.S. 1997). Therein, the Seventh Circuit, sitting *en banc*, reviewed Seventh and other circuit opinions where a *prima facie* case was presented, as was evidence of untruthfulness of the rationale, where verdicts for Plaintiffs were upheld on appeal. The Seventh Circuit, on the facts of *Sheridan*, reversed Judgment as a Matter of Law for the employer on the constructive discharge claim, finding that a "reasonable jury" might well have found an illegal, constructive discharge. The majority harmonized several cases cited by its dissent (some of which were cited by Brandt as allegedly demonstrative of a split in the circuits) as follows:

> It is of interest that of the four (4) cases from other Circuits cited by the dissent as "strong

> contrary authority", in three the actual holding was that the Plaintiff "failed to present sufficient evidence to permit a reasonable factfinder to infer that [the Defendant's] articulated reason was a pretext for unlawful . . . discrimination."

While Eighth Circuit caselaw was, in the past, not always a model of consistency, *Rothmeier*, followed by *Ryther* and *Brandt*, articulate well that current Eighth Circuit thinking is in conformity with the foregoing analysis. *Rothmeier*, 85 F.3d at 1335, 71 FEP at 1462, recognized that a *prima facie* case, with evidence of pretext, will support a Plaintiff's verdict where, based upon a "fact intensive . . . case by case" determination, the evidence is sufficient to "allow a reasonable factfinder to conclude that the Defendant has intentionally discriminated against the Plaintiff." *Ryther*, 108 F.3d at 837, 73 FEP at 376 has applied this "reasonable juror" rule as follows:

> We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.
>
> * * *
>
> fn.2 . . . evidence of pretext *does not always* support an inference of intentional discrimination. As we note, there may be cases where the evidence of pretext is inconsistent with an inference of intentional discrimination.

In the case at bar, the *Brandt* panel merely found that Plaintiff's evidence of preselection, *i.e.* that Dougherty wanted to hire an old

friend and tailored a job especially for him was, based upon the evidence, inconsistent with an inference of sex discrimination.

Thus, caselaw is not demonstrative of a split within the circuits, but rather is demonstrative of the "unremarkable principle", *Fisher*, 114 F.3d at 1338, 74 FEP at 112, that every case is decided upon its own peculiar facts.

3. FRCP 56 Summary Judgment Cases

Brandt also cites several FRCP 56 Summary Judgment Cases where the record was inadequately developed to allow Summary Judgment for an employer to be upheld — given the presence of the *prima facie* case, with some evidence of untruthfulness. In several of the cases cited by Brandt as allegedly demonstrative of a split within the circuits, employers were prematurely granted Summary Judgment. In other words, in these cases, Plaintiffs submitted *prima facie* cases, together with some evidence of untruthfulness of the legitimate, nondiscriminatory rationale. Nevertheless, the District Courts granted Defendants Summary Judgment. Several Courts of Appeal have reversed in this procedural posture, based primarily upon an undeveloped record. For example, in *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 921, 63 FEP 838, 843 (11th Cir. 1993) the court held as follows:

> . . . Plaintiff's burden at Summary Judgment is met by introducing evidence that could form the basis for a finding of facts, which taken in the light most favorable to the non-moving party, could allow a jury to find a preponderance of the evidence that the Plaintiff has established pretext, and that the action taken was in retaliation for engaging in the protected activity. Issues of fact and sufficiency of evidence are properly reserved for the jury. The only issue to be considered by the Judge at Summary Judgment is

whether the Plaintiff's evidence has placed material facts at issue.

Summary Judgment cases and Judgment as a Matter of Law cases arise in a totally different procedural posture.[14] Summary Judgment cases are matters of foresight, based upon an undeveloped record. Judgment as a Matter of Law cases are matters of hindsight, based upon a review of an entire trial transcript. District Courts (and Courts of Appeal) are therefore, much more reluctant to enter (or uphold) Summary Judgment for employers in undeveloped employment discrimination cases since proof of subjective intent goes to the heart of the claim.

As indicated in *Hairston*, certain issues are properly reserved for the jury and should not, pre-trial, be circumvented by Summary Judgment. Neither *Hairston*, nor any of the Summary Judgment cases cited by Brandt, purport to modify the post-trial "reasonable jury" standard of FRCP 50(a)(1) — nor do they attempt to overrule the *Hicks* mandate that normal appellate review is always available. In a post trial setting, *Hicks* indicates that appellate review proceeds according to the usual standards, *i.e.* the "reasonable juror" standard.

Several of the cases cited by Plaintiff are simply cases of prematurely granted Summary Judgment. *See Batey v. Stone*, 24 F.3d 1330, 65 FEP Cases 1161 (11th Cir. 1994); *Perdomo v. Browner*, 67 F.3d 140, 68 FEP Cases 1751 (7th Cir. 1995); and *Washington v. Garrett*, 10 F.3d 1421, 63 FEP Cases 540 (9th Cir. 1993). Consequently, they are not illustrative of Brandt's proposition that an appellate court lack the authority provided under FRCP 50(a)(1).

4. The Eleventh Circuit

The overwhelming majority of the caselaw cited by Plaintiff, allegedly demonstrative of the split between the circuits is easily

14. *See Isenbergh, infra*, 97 F.3d at 443, 72 FEP at 741, n.4 which recognizes the practical and legal distinction.

handled: a few of the cases deal with the presence or absence of a *prima facie* case and/or evidence of untruthfulness; most of the cases are factually intensive transcript reviews to determine whether a "reasonable jury" might reasonably have inferred intentional discrimination from the record evidence of *prima facie* case and untruthfulness of rationale; finally, a few of the cases are simply cases of prematurely granted Summary Judgment where the record evidence had not yet been well enough developed. Thus, the caselaw of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and D.C. Circuits do not adhere to the proposition that Brandt would foist upon Employers, *i.e.* that Judgment as a Matter of Law can **never** be appropriate in a discrimination case, where at least one (1) of the employer's legitimate, nondiscriminatory reasons is rejected as untrue. Such a rule would repeal FRCP 50(a)(1) and overrule *Hicks*.

Two (2) of the Judges of the Eleventh Circuit (Birch and Carnes), however, apparently agree with Brandt. *See Combs v. Meadowcraft, Inc.*, 106 F.3d 1519, 1538, 73 FEP 232, 245 (11th Cir. 1997). This does not, however, warrant a grant of *certiorari* herein, for all it presents is, at best, an intra-circuit conflict where the court *en banc* has not yet had the opportunity to resolve the issue. The usual rule applied elsewhere within the circuits was articulated by another Eleventh Circuit Panel in *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 441, 442, 72 FEP 735, 739, 740 (11th Cir. 1996). Therein, Judgment as a Matter of Law was granted for the employer and Plaintiff presented essentially the same argument as does Brandt herein, *i.e.* JAML is never appropriate where Plaintiff has submitted a *prima facie* case and has adduced some evidence of untruthfulness of the Defendant's articulated rationale. The Court succinctly rejected this contention:

> This case is about Rule 50. Isenbergh argues that never can an employer be entitled to a Judgment as a Matter of Law in an employment discrimination case if the evidence is sufficient to allow the jury to

> disbelieve the employer's proffered reason for the employment action.
>
> * * *
>
> . . . We have no confidence that the *Hicks* decision dictates to Circuit and District Judges, or even was intended to suggest, that every time the evidentiary record in a case could support a jury's disbelief of the employer's explanation for the pertinent action, no Court may grant a Motion for Judgment as a Matter of Law to the employer. . . .

Thus, *Combs*, at best, presents only an intra-circuit conflict with *Isenbergh*. Inasmuch as the Eleventh Circuit, *en banc*, has not spoken to this issue,[15] it would be premature to declare that a split within the circuits exist. Instead, two (2) Judges from the Eleventh Circuit have deviated from the rulings within their own circuit, hardly creating an *important* issue for Certiorari.

II. BRANDT IS ESTOPPED TO COMPLAIN THAT THE EIGHTH CIRCUIT FOUND THE ABSENCE OF INTENTIONAL DISCRIMINATION WHERE IT DID SO THROUGH EXPRESS RELIANCE UPON PLAINTIFF'S ARGUMENT THAT THE SUCCESSFUL CANDIDATE WAS THE BENEFICIARY OF PRESELECTION.

Shop 'n Save's evidence at trial was that it created the Apprentice Meatcutter position in order to groom the successful candidate for a management position — and shortly thereafter learned of Bob Frentzel's availability (knowing full well his history of college and management). At trial and before the Eighth Circuit, Brandt urged just the converse, *i.e.* that John Dougherty learned of

---

15. The Second, Third, Fifth and Eighth Circuits have spoken *en banc*.

Frentzel's availability — and Shop 'n Save, thereafter, tailored the Apprentice Meatcutter position's qualifications precisely to fit Frentzel's resume. The Eighth Circuit agreed with Brandt that Frentzel had been preselected and rejected and reversed Shop 'n Save's chronology. Plaintiff now bitterly complains that the Eighth Circuit adopted her theory of the case!

This issue is obviously not worthy of Certiorari, for two (2) reasons: **First**, Plaintiff has failed to cite any caselaw — much less a split within the circuits — which precludes a court from adopting a litigant's own theory and then from using it against that litigant; **Second**, there is obviously no importance to this issue which is purely personal to Brandt who is unhappy that her case handling tactics have "boomeranged" against her.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

MICHELLE M. CAIN
Counsel of Record
ROBERT W. STEWART
SHELLEY M. ROITHER
McMAHON, BERGER, HANNA
LINIHAN, CODY & McCARTHY
Attorneys for Respondent
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350

APPENDIX A — EXCERPTS FROM PETITIONER'S REBUTTAL ARGUMENT AT THE DISTRICT COURT

REBUTTAL ARGUMENT

BY MR. MOENCH:

MR. MOENCH: Ladies and gentlemen, it may be interesting what Mr. Stewart believes, but what he believes is not evidence. He just told you he believes the Defendant deserves a verdict, that is not worth any credible evidence, and I ask you to ignore that comment of what he believes. He's paid to believe what he believes. Just like Bill Fant and Danny Howard and John Dougherty are paid by the Defendant. There are a number of points that Mr. Stewart made with you that I want to address. First of all, he attacked Kim's credibility, Kim Brandt's credibility. One of the problems he had was that she wrote the word "female," before apprentice meat cutter in her letter to Dick Marty and her letter to Butch Covili. I asked you to look at those letters, look at the two letters and look at the dates, they were both written on August 17, the wording is similar in both. I believe that'll explain by itself why Kim put the word "female," before apprentice meat cutter. She was letting Dick Marty know what was going on, and she was copying Butch Covili with the letter she sent Marty. Next, he attacks her because she said Chippewa is 2 miles further away from her home in Wood River, than Collinsville. And he put on a witness to prove her wrong, and you know what that witness said? It's 3 to 4 miles further from Wood River to Chippewa than it is to Collinsville. I submit that's not a real significant fact with which he impeached Ms. Brandt's credibility. Ladies and gentlemen, we don't even know where in Wood River Ms. Brandt lives, I don't think that's worth any impeachment value of Kim's testimony. And if they're that desperate to impeach our Plaintiff, I submit they're in pretty bad shape. Now, I also want you to look carefully at these

instructions. Mr. Stewart seemed to imply that we were asking you to give Kim money because since 1987 Danny Howard had been telling her he wanted to hire her on full-time. Look at these instructions, nowhere in there is Kim asking you for any money damages because of that. The money damages she's asking you for are the denial of the apprentice meat cutter job and the damage she suffered as a result of the retaliation after her EEOC charge. Now, he also made a point of his fishing expedition. First of all, I don't know how you'd know if you caught a female fish, but that's beside the point. The point is that when you have a field of male meat cutters it's unusual for a female to come in and file an application. In fact, none of the Defendants that testified about it could tell you of one other female who ever applied. That tells me it must have meant something to Danny Howard when Kim said, "I want to be an apprentice meat cutter". I think that's the significance of that fact. Now, Mr. Stewart also told you that Kim's here to take Bob Frentzel's job away from him. Nothing could be further from the truth. Bob Frentzel is not gonna lose his job if Kim Brandt wins this lawsuit. Then he also read to you from the instructions, but I'm gonna ask you again, to read these instructions carefully, because he added some words to it. He said that you'll be instructed that,

> "Your verdict will be for Plaintiff if you find first, Defendant failed to award Plaintiff an Apprentice Meat Cutter position,"

and he admitted we've proved that. And second,

> "That Plaintiff applied for and was qualified for the position".

Here's where we added some words, "That the Defendant had

designed," that doesn't appear in these instructions, ladies and gentlemen. That's their whole defense to this case, that they designed this Apprentice Meat Cutter position with Bob Frentzel specifically, — or with management specifically in mind. The instruction does not say it. About college hours, I have to admit, I can't tell you today how many college hours I have, but I can tell you I have a degree, and so can Mr. Stewart. If I don't have a degree and I'm applying for a job that requires education I'm gonna know how much education I have when I go on an interview for that job.

* * *

APPENDIX B — EXCERPTS FROM PETITIONER'S BRIEF TO THE EIGHTH CIRCUIT

* * *

Applied to the present case, ***Coble, Lams, Greer,*** and ***Roberts*** instruct that Kim Brandt has made a prima facie case. She adduced evidence of what the true qualifications were for an apprentice meat cutter, according to the company's collective bargaining agreement and its own apprentice program developed specifically for the opening at issue. **PX 32, 91 (Appellee's App. 35, 69).** Those qualifications did not change with the new contract, entered into after the promotion at issue. **PX 10 (Appellee's App. 1).** The company could produce nothing but the decision maker's testimony to show that management experience and college were added qualifications for this particular opening — the only apprentice meat cutter opening the company has ever had. The jury reasonably concluded that the added qualifications were not true, but were tailored to fit the preselected man for the job — a man who had virtually no meat experience. That conclusion is bolstered by the evidence that none of the decision makers in the interview asked Frentzel, or even knew at trial, how much college he had, and Frentzel did not write it on the application he filled out after the interview. Neither had Frentzel made it into management at trial time, three and one-half years after he was hired. Clearly, as in ***Coble*** and ***Greer,*** there was evidence that the company adjusted the qualifications it required to fit the man that it wanted for the job.

* * *

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* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KIMBERLY BRANDT,
Petitioner,

VS.

SHOP 'N SAVE WAREHOUSE FOODS, INC.,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM E. MOENCH
(Counsel of Record)
MARY ANNE SEDEY
SEDEY, MOENCH & ASSOCIATES
3030 South Grand Avenue
Suite 200
St. Louis, Missouri 63118
(314) 773-3566

Attorneys for Petitioner Brandt

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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ARGUMENT

I. RESPONDENT MISCHARACTERIZES PETITIONER'S ARGUMENT

Respondent's opposition is based on a mischaracterization of Petitioner's points, with no citation to any page or paragraph. Nowhere in the petition does Petitioner claim that, as Respondent puts it, "JAML for an Employer can **never** be appropriate," and nowhere does Petitioner claim that FRCP 50(a)(1) has been, "*sub silentio,* repealed." Resp. Brief 14. By exaggerating, Respondent attempts to couch Petitioner as advocating a return to a "pretext only" rule, as the Eighth Circuit followed before *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 [62 FEP Cases 96] (1993). This is simply not true.

Petitioner does maintain that since this Court's ruling in *Hicks*, there is a split among the Circuits (as well as between Petitioner and Respondent) as to what *Hicks* means. Petitioner stands by her earlier analysis of the case law in her Petition, and leaves this Court to come to its own conclusion regarding the split among the Circuits.

II. PRE-SELECTION OF LESS QUALIFIED MALE IS EVIDENCE OF SEX DISCRIMINATION

The most obvious mischaracterizations Respondent makes in its Reply Brief are its exclamations that "Plaintiff now bitterly complains that the Eighth Circuit adopted her theory of the case!" (Resp. Br. 29) and "The Eighth Circuit agreed with Brandt's theory of the case, and now *she is unhappy with her success!*" (Resp. Br. 9). In the underlying case, Petitioner did (and still does) argue that even if Shop 'n Save *did* preselect Frentzel, that adds to the evidence supporting a finding of discrimination. Precedent on that issue is clear. In its brief to the Eighth Circuit, Petitioner cited cases, including two from the

Eighth Circuit, which hold that evidence of preselection of a less qualified person outside the protected group supports a finding of illegal discrimination.

In *Lams v. General Waterworks Corp.*, 766 F.2d 386, 58 FEP 516 (8th Cir. 1985), a race discrimination case, two promotions were given to white men without the plaintiffs' knowledge. The plaintiffs were black men working in the defendant's Construction and Maintenance (C&M) department, which was primarily occupied by black employees. The promotions were to jobs in a primarily white department. As in *Brandt*, the plaintiffs had earlier expressed an interest in being promoted. Also as in *Brandt*, the openings were not posted, the plaintiffs were not told about the openings, and neither plaintiff was even considered for promotion.

The court noted the extreme disparity in the makeup of the defendant's workforce, in that a heavy concentration of black employees existed in the C&M department, while there were only three blacks employed outside that department. "This alone was sufficient to raise an inference of discrimination in promotions and hiring for those job classifications." *Id.* at 391. The Court also noted that reliance on word of mouth recruitment may easily result in discriminatory decisions. *Id.* at 392.

> The record shows that the blacks who had expressed an interest in promotion were simply not considered for the promotions. . . This maintenance of a largely segregated work force, by an all-white supervisory staff which ignored or discouraged black employees' efforts to see promotions into all-white or predominantly white job classifications, constitutes a clear violation of Title VII.

Id. At 393-394. The same logic applies to *Brandt* — simply substitute the word "woman" for "black," and "male" for "white."

A similar situation in a sex discrimination setting occurred in *Greer v. Univ. of Arkansas Bd. of Trustees*, 544 F. Supp. 1085,

33 FEP 77 (E.D. Ark. 1982) aff'd in relevant part, *Behlar v. Smith,* 719 F.2d 950, 33 FEP 92 (8th Cir. 1983). There, several women, including Dr. Rosemarie Word, alleged sexually discriminatory failure to promote. Dr. Word's claim arose in the spring of 1980, when the male Director of Educational Experiences announced his intent to retire at the end of that year. On March 25, 1980, Dr. Word applied to replace him. The next day, she was informed by letter that "a recommendation has already been made for a person to assume the majority of the responsibilities that were a part of the job description. . . ." *Id.* at 1096. Then, on June 4, 1980, a notice of vacancy was posted for the job, and included in the posted qualifications was "a minimum of three years of teaching experience at the public school level: preferably in mathematics, professional training or experience in the use and interpretation of statistical data." *Id.* at 1097. A preselected male, Dr. Rancifer, was given the job.

The District Court found that the quoted qualifications bore no reasonable relationship to the duties of this job; thus, their inclusion in the job posting "was simply a pretext for excluding Dr. Word from this position and making it available to Dr. Rancifer, who had taught math in high school." *Id.* at 1097. Again, this logic applies to *Brandt*: simply substitute Brandt's and Frentzel's names, and adjust the pretextual "qualifications." The Court found that this evidence supported an inference of sex discrimination, as well as a finding that the articulated qualifications were pretextual.

In *Coble v. Hot Springs School Dist. No. 6,* 682 F.2d 721, 29 FEP 201 (8th Cir. 1982), plaintiff Susan Chapman had worked for the defendant for ten years when her job was eliminated. She was told by a school administrator that a counseling job was about to open at another school in the district. Chapman expressed interest, and was told she would be interviewed. Later, however, she was told "the position might require certification in French and counseling." Chapman, who was not certified to teach

French, was not interviewed. The preselected man who got the job, Drew Alexander, was the only teacher in the district with certification in French and in counseling.

The Eighth Circuit reversed a judgment for defendant on Chapman's claim, saying, "There was persuasive evidence of preselection. . . . This evidence discredited the validity of the French certification requirement. Chapman established a prima facie case by showing that she had 'applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination.*'" *Id.* at 728 (emphasis added; citation omitted). The *Brandt* evidence of preselection (making the job fit Frentzel's background) is strikingly similar to that in *Cole*, and gives rise to the same inference. *Coble* remains the law of the Eighth Circuit, as well as other circuits. *See, e.g., Hartman v. Wick*, 600 F. Supp. 361, 363; 36 FEP 622, 625 (D.C.D.C. 1984) ("If proven, such preselection, in the form of 'tailoring' the job qualifications to those of a particular candidate, violates Title VII.") (citing *Coble*).

In *Roberts v. Gadsden Memorial Hospital*, 835 F.2d 793, 45 FEP 1246 (11th Cir. 1988), the Eleventh Circuit was faced with another preselection case with similarities to *Brandt*. There, a white maintenance supervisor resigned, having earned a wage of $4.42 per hour, and recommended a subordinate black employee, Roberts, to replace him. The defendant offered the job to Roberts, but at a wage of $3.50 per hour. Roberts turned down the offer because of the wage disparity, but did perform the duties of the job until a permanent replacement (white male) was hired. Roughly three years later, a new administrator came to the hospital, and forced the resignation of the white maintenance supervisor. That same day, the new administrator filled the job with another white male, Harrison, who had been working there for only three weeks as a scrub technician, but was a social friend of the new administrator. As in *Brandt*, no notice of the opening

had been posted. Accordingly, Roberts did not apply, although his interest in the job was obvious from his earlier experience. Roberts filed a claim for racially discriminatory failure to promote, and won a judgment. The Eleventh Circuit found that he established a prima facie case:

> [W]hen the failure to promote arises out of an informal, secretive selection process, . . . a plaintiff may raise an inference of intentional, racially-disparate treatment without proving that he technically applied for, and failed to obtain, the promotion. . . . Accordingly, rather than technically retrace the District Court's steps through the McDonnell Douglas-Burdine test, we will engage in a more flexible analysis to determine whether the record supports the district court's finding. . . .

Id. at 797. The Court found that the administrator had placed "undue emphasis" on Harrison's college degree, stating, "The fact that Harrison had achieved a degree in horticulture did not overshadow Roberts' cumulative experience of more than a decade of 'hands-on' maintenance experience at GMH." *Id.* at 797. Also, and most relevant to *Brandt*, the Court noted the friendship between Harrison and the decision maker, and found that "this promotion decision was nothing more than a typical 'good ol' boy' appointment." *Id.* at 798. Accordingly, Roberts met his *McDonnell Douglas* burden of raising an inference of discriminatory motivation, as well as pretext. *Id.* at 799.

Thus, in each of these four cases, the courts found that in Title VII settings, evidence of preselection of a member outside the protected group supports a finding of intentional discrimination, as well as pretext. Petitioner presented the same scenario. Petitioner proved what the true qualifications were for an apprentice meat cutter, according to the company's collective bargaining agreement and its own apprentice program developed specifically for the opening at issue. Those qualifications

did not change with the new contract, entered into after the promotion at issue. The company could produce nothing but the decision maker's testimony to show that management experience and college were added qualifications for this particular opening — the only apprentice meat cutter opening in the company has ever had. The jury reasonably believed the added qualifications were not true, but were tailored to fit the preselected man — a man who had virtually no meat experience. Thus conclusion is bolstered by the facts that none of the decision makers asked Frentzel, or even knew at trial, how much college he had; Frentzel did not write it on the application he filled out *after* the interview; and Frentzel never made it into management. Clearly, under *Lams, Greer, Coble, and Roberts*, this preselection evidence supports a finding of sex discrimination.[1] Yet, the Eighth Circuit held the opposite, without even addressing this "good ol' boy network" precedent.

Here is where the twist comes into this case. The majority for the Eighth Circuit *believed* Frentzel was preselected, stating, "It is apparent that the position was created for Frentzel, with the job's 'qualifications' tailored to Frentzel's background, rather than that Frentzel coincidentally and fortuitously happened into a just-created position that required his 'qualifications'." Yet, despite finding preselection and disbelieving the Respondent's denial of it, and despite its own precedent in *Coble* and *Lams*, the majority found that evidence of a "good ol' boy" network was evidence of a *non*-discriminatory motive. No evidence from

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[1] Understandably, in light of these cases, Respondent did not admit that Frentzel got the job because of this "good ol' boy" network— rather, it flatly *denied* it. When asked at trial if he knew Frentzel was looking for a job when management decided to hire an apprentice meat cutter, one of the decision makers answered "No." If the fact finder disbelieves this denial (as the jury, the judge, and the Eighth Circuit did), the cover-up itself further reinforces the notion that the preselection was motivated by illegal discrimination.

either Petitioner or Respondent supported the conclusion that this was the result of anything other than sex discrimination.

The Eighth Circuit majority relied on *Rothmeier* for the proposition that evidence from the Plaintiff actually *refuting* its own theory of sex discrimination defeats the inference of sex discrimination. But this is not a case like *Rothmeier,* where the plaintiff acknowledged he was fired for a non-discriminatory reason and therefore no inference of discrimination remained. The majority's opinion flies in the face of reason, as well as *Lams, Greer, Coble* and *Roberts.* As Judge Heaney wrote in his minority opinion, "Brandt's pretext evidence does not point to a nondiscriminatory reason for passing her over nor has she offered or acknowledged such a justification. Rather, Brandt vigorously maintains that Shop n' Save's decision was actually gender-motivated." Judge Heaney is exactly right, as was Judge Adelman and the jury who heard the case. Under clear Eighth Circuit precedent, Brandt has carried her burden of proof.

III. RESPONDENT'S MISCHARACTERIZATIONS OF THE RECORD

Respondent claims in its Statement of the Case (Resp. Br. at 4) that Frentzel had four years of college, citing three pages of the transcript in this case, but not filing those pages with this Court. A review of the cited pages of the transcript reveals no such testimony. Appendix A.

Secondly, Respondent claims that neither Dougherty, Fant nor Howard knew of Plaintiff's interest in a meatcutter position (Resp Br. 5); yet, on the next page, Respondent admits that Plaintiff testified she told Howard. Respondent then simply argues the facts, claiming that this one conversation would not have "stuck out" in Howard's mind— an argument that the jury clearly didn't buy. This is understandable, given that Kim Brandt was the only woman who sought a promotion into the

man's world of meatcutting. In any event, it is clearly a factual determination for the jury to make.

CONCLUSION

Despite Respondent's misstatements of the record and Petitioner's argument, the record clearly demonstrates evidence upon which a jury could reasonably base a finding of sex discrimination. This evidence includes the sexually segregated workforce, pay disparity, and preselection of a male for the job through the "good ol' boy" network. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

William E. Moench*
Mo. Bar No. 34420
Mary Anne Sedey
Mo. Bar No. 26731
Sedey, Moench & Associates, P.C.
3030 South Grand, Suite 200
St. Louis, Missouri 63118
(314) 773-3566

Attorneys for Petitioner Brandt

*Counsel of Record

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 4:9:92CV1012 (TIA)

KIM BRANDT,
Plaintiff,

vs.

SHOP 'N SAVE,
Defendant.

St. Louis, Missouri
October 26, 1994
9:30 a.m.

TRANSCRIPT OF THE JURY TRIAL — VOLUME III
BEFORE THE HONORABLE TERRY I. ADELMAN
UNITED STATES MAGISTRATE JUDGE

TRANSCRIPT ORDERED BY: Robert Stewart

APPEARANCES:

For the Plaintiff:	William Moench 2256 South Grand, #3 St. Louis, Missouri 63104 (314) 773-3566
For the Defendant:	Robert Stewart 2730 North Ballas, #200 St. Louis, Missouri 63131 (314) 567-7350
Recorded By:	Lisa Lang, Court Recorder

Transcribed By: Deborah A. Carter

Deborah A. Carter
Carter Transcription Services
10426 Castle Drive
St. Louis, MO 63136
(314) 868-2611

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[51]

ing the meat cutting trade, then we didn't need him. That we wanted to train somebody we could use in a management position.

Q. Alright. What else did you discuss during that meeting?

A. Well, I was impressed with the fact that he had supervised fifty unionized people at this screen door place where he had worked in the past. And Bob, even though Bob was from a family that come [sic] from a meat background, Bob didn't have a lot of experience in meat himself.

Q. What difference did that make?

A. Well, he knew what the job was going to be like. He knew what it was going to be like, but we wanted to train him. We didn't want to pick up any bad habits. We had gone through picking up a lot of Kroger people, after Kroger went out of St. Louis. And we had to train them our way, and sometimes old habits are hard to break, so.

Q. Alright. Did you discuss his education?

A. Yes, we did.

Q. And what did you learn?

A. He had some college background. I'd have to read it to refresh my memory on it, but, —

Q. Do you recall about how much management experience Mr. Frentzel had?

A. I don't remember how many years, and again, I'd have to read it to find out.

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Q. When was the decision made to hire Bob Frentzel?

A. Pretty much right then. You know, I went to John and I told John, I says, "Hey, you know, looks like the perfect candidate".

Q. Why did you think Bob Frentzel was the perfect candidate?

A. Well, like I said, the thing most impressed me was he had management background where he had supervised fifty unionized employees. And that was probably a determining factor on him, as far as I was concerned.

Q. Alright. What sort of person was he in the interview?

A. Well, he was very upbeat and certainly had a good desire and good attitude, friendly person.

Q. So where were you when this decision to hire Bob Frentzel was made?

A. I was still in my office.

Q. And who else was there?

A. We had called John Dougherty over, Danny Howard was there.

Q. Who was selected to notify Bob Frentzel of his hire?

A. I think Mr. Dougherty done that.

Q. Okay. Let me show you what's been marked as Defendant's Exhibit X. Can you identify that document?

A. Yes. It's our Union Contract with Local 88.

Q. And did that cover the timeframe of 1989 through 1992?

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Q. Okay. When was the decision made to hire Bob Frentzel?

A. Pretty quick after that, right after he left, —

Q. Okay.

A. — 'cause he had all of the qualifications we decided that we wanted.

Q. Okay. Now, when Bob Frentzel was hired, did you give any consideration to hiring Mrs. Brandt for that position?

A. No. I didn't know about it.

Q. Okay.

A. I didn't know she was interested, no.

Q. Okay. Did you learn, — I guess you did, you're here. Did you learn at some point that Mrs. Brandt had filed a lawsuit against the company?

A. Yeah.

Q. And when did you learn that?

A. I don't really remember, I think it was the summer of '93, something like that, after Bob went through the apprenticeship.

Q. Okay. Before you learned last summer that she filed a lawsuit, did you have any knowledge that she'd filed what's called a EEOC Charge against the company?

A. No sir.

Q. You know what an EEOC Charge is?

A. No sir.

Q. After Bob Frentzel was hired, has it ever been discussed

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